Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHELE FEINBERG TRULL,

Petitioner,

vs.

MICHAEL B. FEINBERG,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does state court enforcement of a testamentary trust instrument that disqualifies and deems "deceased" a beneficiary who later marries "outside" of a specific religious faith violate the Equal Protection and Establishment Clauses of the United States Constitution?

LIST OF PARTIES

Michele Trull *née* Feinberg

Michael B. Feinberg

Aron Feinberg

Marshall B. Taylor

Leila R. Taylor

Lisa Taylor-Schroeder

Jon Taylor

Aimee Taylor-Severe

Fifth Third Bank, as Trustee of the Trusts of Max Feinberg, Deceased.

In addition to the parties, the following entities participated in the Illinois supreme court appeal as *amicus curiae*:

Agudath Israel of America

National Council of Young Israel

Union of Orthodox Jewish Congregations of America

Lisa Taylor-Schroeder and Aimee Taylor-Severe have not appeared by counsel or submitted any pleadings below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest Illinois state court to review the merits appears at Appendix 1-39 to the petition and is reported at *In re Estate of Feinberg*, 235 Ill. 2d 256, 2009 WL 3063395.

The opinion of the Illinois intermediate appellate court that reviewed the merits appears at Appendix 40-62 to the petition and is reported at *In re Estate of Feinberg*, 383 Ill. App. 3d 992, 891 N.E.2d 549 (1st Dist. 2008).

The original Order of the Illinois Circuit Court appears at Appendix 63-68 to the petition and is not published.

JURISDICTION

The date upon which the highest state court decided the case was September 24, 2009. A copy of that decision appears at Appendix 1-39.

A timely petition for rehearing was thereafter denied on November 23, 2009, and a copy of the order denying rehearing appears at Appendix 69.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution – Amendment 14 (Section 1): All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution – Amendment 1: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Max Feinberg amassed substantial wealth during his lifetime and established trusts to distribute those assets after his death. Max's trust instrument

provides specific benefits to his descendants, including his granddaughter, Petitioner Michele Trull *née* Feinberg ("Michele"), but under a provision labeled below the "Religious Preference Clause," deems deceased and excludes any descendant who "marries outside the Jewish faith." Max directed:

> 3.5(e) A descendant of mine other than a child of mine who marries outside the Jewish faith (unless the spouse of such descendant has converted or converts within one year of the marriage to the Jewish faith) and his or her descendants shall be deemed to be deceased for all purposes of this instrument as of the date of such marriage.

(App 63). Max Feinberg intended the Religious Preference Clause to discourage his grandchildren, long after his death, from entering into lawful interfaith marriages. (App 48, 65). The purpose of the Clause can only be secured by enforcement by a state court.

When Max Feinberg wrote the Religious Preference Clause in 1984, Michele Trull was only fifteen years old. (App 6). In 2001, fifteen years after Max died, Michele lawfully married Ethan Trull, who is not Jewish.

A. Proceedings In The Circuit Court

Max Feinberg's estate was submitted to probate in 2005 before the Circuit Court of Cook County, Illinois. There, Leila Taylor petitioned the Court to deem Michele deceased because she had married

outside the Jewish faith. Michele responded arguing that the Religious Preference Clause is unenforceable because, *inter alia*, it is repugnant to Illinois public policy and because enforcement of the clause by a state court would violate the United States Constitution. (App 64).

The Circuit Court ruled that Michele's public policy argument was the "most compelling," and ruled that the Religious Preference Clause is "an invalid restraint on marriage and is contrary to public policy." (App 64, 68). The Circuit Court did not reach Michele's constitutional questions. (App 68).

B. Affirmation By The Appellate Court

Michael Feinberg and Leila Taylor appealed to the Illinois Appellate Court, which reviewed the case *de novo*. (App 43). The Appellate Court affirmed, holding that the Religious Preference Clause violated public policy. (App 48).

Although Michele repeated her constitutional arguments, the Appellate Court did not address them, stating: "As there is clearly a non-constitutional basis on which to resolve this issue, we need not determine whether the provision is also a violation of the state and federal constitutions." (App 48, 68). In a specially concurring opinion, however, Illinois Appellate Justice Quinn noted the applicability of *Shelley v. Kraemer*, 334 U.S. 1 (1948). (App 52).

C. Reversal By The Illinois Supreme Court

Michael Feinberg appealed to the Illinois Supreme Court, which reviewed *de novo* the enforceability of the Religious Preference Clause. (App 8). The Illinois Supreme Court reversed the ruling of the Appellate Court on the basis of its factual finding that after Max Feinberg's death, his widow, Erla Feinberg, altered Max's estate plan by exercising a Power of Appointment to direct the disposition of the assets in Max's trusts (the "POA"). (App 4-6). The Court determined that Erla's exercise of the POA depleted the assets of Max's trusts, rendering moot any issue as to the enforceability of the trust instrument. (App 4).

When Erla Feinberg exercised her Power of Appointment over Max's trusts, she conditioned her POA upon Max's Religious Preference Clause and provided that if, at the time of Erla's death, any recipient of an appointment was deemed deceased, that descendant would not receive his or her appointment. (App 3-4). Erla did not specify by name which recipients should be deemed deceased. Rather she left to the court the tasks of determining who had married "outside the Jewish faith" and deeming those recipients deceased.

At the time Erla Feinberg signed the POA in 1997, Michele still was unmarried. However, by the time Erla died in 2003, Michele was married to Ethan Trull. Michele argued that enforcement of the POA by the Illinois state court likewise violated the United States Constitution. However, the Illinois Supreme Court did not address that argument.

The Illinois Supreme Court erroneously ruled that enforcement of the Religious Preference Clause

is permitted under the Equal Protection Clause. The Court repudiated this Court's holding in *Shelley v. Kraemer*, finding that Michele's reliance on that precedent was "entirely misplaced." The Court stated:

> Indeed, *Shelley* has been widely criticized for a finding of state action that was not "'supported by any reasoning which would suggest that "state action" is a meaningful requirement rather than a nearly empty or at least extraordinarily malleable formality.'" *Adoption of K.L.P.*, 198 Ill.2d at 465, 261 Ill.Dec. 492, 763 N.E.2d 741, quoting L. Tribe, American Constitutional Law 1698 (2d ed.1988).

(App 37).

The Illinois Supreme Court did not comment on Michele Trull's argument that enforcement of the Religious Preference Clause would also violate the Establishment Clause.

REASONS FOR GRANTING THE WRIT

A. The Illinois Supreme Court's Decision Conflicts With This Court's Decision In *Shelley v. Kraemer* And Violates The Fourteenth Amendment

In its decision below, the Illinois Supreme Court did not merely distinguish this Court's landmark holding in *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Court repudiated the holding of *Shelley*. The instant case presents a significant and necessary opportunity

for this Court to clarify its state action doctrine under *Shelley v. Kraemer*, which held that court enforcement of private racially restrictive covenants constitutes state action.

The last time this Court addressed the issue was in *Edmonson v. Leesville*, 500 U.S. 614 (1991), almost 20 years ago. There, the Court held a private litigant's use of peremptory challenges to exclude black jurors was unconstitutional, stating: "Although private use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state action, our cases have found state action when private parties make extensive use of state procedures with the overt, significant assistance of the state." *Id.* at 622.

In the 20 years since this Court last addressed the issue, lower courts – like the Illinois Supreme Court – have become confused about how to apply the state action doctrine. As one commentator observed:

> For generations of legal scholars, the state action doctrine of the Fourteenth Amendment has been the proverbial constitutional briarpatch almost hopelessly tangled and tenaciously resistant to reform.

Alan R. Madry, *State Action and the Obligation of the States to Prevent Private Harm: The Rehnquist Transformation and the Betrayal of Fundamental Commitments*, 65 S. Cal. L. Rev. 781, 781 (1992).

Since *Shelley* was decided, some courts and commentators have erroneously concluded that "the decision, on its face, would require all private agreements

to satisfy constitutional standards because the enforceability of the covenants almost always depends on state court action." Thomas F. Guernsey, *The Mentally Retarded and Private Restrictive Covenants*, 25 Wm. & Mary L. Rev. 421, 443 (1984); *see also*, J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 Mich. L. Rev. 302, 316 (1995) ("[*Shelley*] has proven controversial because it could be read to mean that any court involvement in an essentially private dispute satisfies the state action requirement.").

The Illinois Supreme Court made this erroneous interpretation, stating it "has been reluctant to base a finding of state action 'on the mere fact that a state court is the forum for the dispute'" (App 37), citing *Adoption of K.L.P.*, 198 Ill. 2d at 465, 261 Ill.Dec. 492, 763 N.E.2d 741, quoting Lawrence Tribe, *American Constitutional Law* 1698 (2d ed. 1988).

Recently, Professors Solove and Richards have reminded lower courts, commentators and practitioners that "*Shelley* is best understood not as a state action case but rather as a Fourteenth Amendment case. Every judicial decree might be state action, but only judicial decrees creating special Fourteenth Amendment dangers violate the Fourteenth Amendment." Daniel Solove & Neil Richards, *Rethinking Free Speech and Civil Liability*, 109 Colum. L. Rev. 1650, 1700 (2009). The Illinois Supreme Court missed this important distinction.

The United States Court of Appeals for the Third Circuit recognized three categories of state action cases:

> (1) where state courts enforced an agreement affecting private parties; (2) where the state 'significantly' involved itself with the private party; and (3) where there was private performance of a government function.

Magill v. Avonworth Baseball Conference, 516 F.2d 1328, 1331 (3rd Cir. 1975) (citing cases). *Shelley* and the instant case fall within the first category.

As stated by one commentator, "The lesson of *Shelley*, reaffirmed in *Palmore*, is simply that a private party is not entitled to have its wishes enforced by the government when such enforcement would be unconstitutional. The private motivation in such a case ceases to be private when it becomes the basis for governmental action." Barbara Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 Cornell L. Rev. 1053, 1084 (1990) [hereinafter "State Action"]. Illinois Appellate Justice Quinn understood this important distinction when, in his specially concurring opinion, he stressed the "applicability of Shelley to cases such as the instant one." (App 52).

The purpose of the Religious Preference Clause at issue here is not in doubt. According to the Illinois Appellate Court:

> The provision's clear intent was to influence the marriage decisions of Max's grandchildren based on a religious criterion and

> thus to discourage marriage by the grandchildren other than to those of the Jewish faith.

(App 48). This purpose can only be secured via enforcement by a state court.

Professor Snyder addressed the application of this Court's dictate in *Shelley* in the specific context of testamentary instruments like the one at issue here. She wrote:

> Does the theory proposed here mean that a testator cannot leave his property to whomever he chooses? A testator may leave his property to any person he chooses, but he cannot expect a state court to enforce certain restrictions if such enforcement would violate the equal protection clause.
>
> Consider a hypothetical situation: A testator, T, is white and believes that his children should marry someone of the same race. T has two children, A and B. A is married to a person who is not white. T decides for that reason to leave nothing to A in his will ("to my child, A, I leave nothing"). . . . The state court, in enforcing the terms of the will, would not have to base its decision on any criteria prohibited by the Constitution.
>
> Assume that B is not yet married. T decides to leave B his entire estate on the condition that, if she marries, she marries a white man. . . . To enforce the provision in the will, the probate court would have to

> decide the case by looking at the race of B's husband; if he is white, B wins and if he is not white, B loses. The explicit use of a racial classification by the probate court would fail under strict scrutiny, just as it did in *Shelley*.
>
> * * *
>
> [T]here is a difference between the harm inflicted by a private party on another private party and the harm inflicted by government on a private party. . . . In B's case, the racial prejudice also originated with T, but the state would have made itself a part of that racial discrimination if it had enforced the racial restriction in the will. Such enforcement would constitute state action in violation of the equal protection clause of the fourteenth amendment.

Barbara Snyder, *State Action*, 75 Cornell L. Rev. at 1090-91 & n. 202.

Because Max Feinberg's Religious Preference Clause was designed to be operative long after his death, it can serve its purpose only if it is enforced by the state. This is the precise kind of situation that falls within the purview of this Court's holding in *Shelley* and subsequently in *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967) (the challenged statute was deemed unconstitutional because it "authorized" invidious unconstitutional discrimination).

The Religious Preference Clause does not call for the state to be neutral, but instead it requires the state to actively discriminate against Michele on the

basis of religion. Such conduct by the state is prohibited by the Equal Protection Clause, as interpreted by the Court in *Shelley v. Kraemer*. The Illinois Supreme Court effectively repudiates *Shelley*. Plaintiffs respectfully move this Court to grant certiorari to provide much needed guidance to lower courts regarding how properly to interpret *Shelley* in connection with the interpretation and enforcement by the state of testamentary instruments.

i. Even Under a "Balancing View," the Illinois Supreme Court's Decision is Unconstitutional

The view of state action articulated by Professor Snyder and described in Section A, above, is an example of what has been referred to in the academic and legal literature as a "unitary view" of state action.

In contrast to the "unitary view" is the balancing view, advocated by Professor Lawrence Tribe (the sole authority relied upon by the Illinois Supreme Court) and others. *See, e.g.*, Lawrence Tribe, *American Constitutional Law* § 18-1, at 1688 (2d ed. 1988); Robert J. Glennon & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 Sup. Ct. Rev. 221, 232 (hereinafter "*Functional Analysis*"). As one commentator has explained:

> Insightful federal state action commentary should recognize that the incoherence of traditional state action inquiry is inevitable.

> The traditional concept of state action is unitary: "the only issue is whether sufficient state contacts do, or do not, exist." Recent commentary, however, asserts the impossibility of achieving a unitary state action doctrine. Commentators urge that state action inquiry should be viewed as a ruling on the merits of the underlying constitutional claim. In practice, courts purport to examine the nexus between government and the practice of the alleged wrongdoer; yet such a characterization obscures the actual inquiry undertaken. Courts actually balance "the relative merits of permitting the challenged practice [of the alleged wrongdoer] to continue against the limitation which it impose[s] on the asserted right [of the aggrieved party]."

William W. Kilgarlin & Banks Tarver, *The Equal Rights Amendment: Governmental Action and Individual Liberty*, 68 Tex. L. Rev. 1545, 1568 (1990).

The authors note that Professor Lawrence Tribe – the only authority cited by the Illinois Supreme Court in support of its decision to disregard *Shelley* (the other "precedent" it cites is its own decision, which cites only Tribe and Illinois decisions citing Tribe) – can generally be described as an adherent to the "balancing view" advocated by Professors Glennon and Nowak. *See, e.g.*, Robert J. Glennon & John E. Nowak, *Functional Analysis*, 1976 Sup. Ct. Rev. at 232.

Any application of a "balancing test" weighs heavily in Michele's favor due to her fundamental

right to choose who to marry and the degree to which the decision implicates courts in ecclesiastical determinations, such as who is (or is not) a *bona fide* member of the "Jewish faith" (or marries "within" that faith), thereby implicating and violating the Establishment Clause and constitutionally impairing the fundamental right to marry.

B. Enforcement Of The Religious Preference Clause Violates The Establishment Clause

This case also presents issues of societal importance concerning the Establishment Clause of the United States Constitution, which bars any state from placing its official support behind a religion. The Illinois Supreme Court erred when it disregarded the Establishment Clause in its holding. The Court should have determined whether enforcement of the Religious Preference Clause would tend to establish a religion or religious faith:

> In the line drawing process, we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement with religion.

Lynch v. Donnelly, 465 U.S. 668, 678 (1984).

The State of Illinois cannot enforce Max's Clause if the primary effect of the court's order would be to

advance or inhibit religion. In this case, it is apparent that the primary effect of a state court order enforcing the Religious Preference Clause would be an advancement of a particular religion. As the Circuit Court found, "This clause was intended by the decedent, as was asserted by the co-executor [Appellant Leila Taylor], as a 'way of promoting through his own family the preservation of the Jewish culture and faith that he both treasured and feared was at risk.'" (App 65).

While it was perfectly permissible for Max Feinberg, as an individual, during his life, to promote and preserve his particular faith, the state cannot do the same by enforcing the Religious Preference Clause without running afoul of the Establishment Clause.

Moreover, the Illinois Supreme Court's decision requires the state to do something it is not constitutionally permitted to do: to point the finger of the law at Michele and tell her she has married outside the Jewish faith and is thus deemed legally deceased. If a court were to find that Michele "married outside the Jewish faith," it would be making a religious determination of the kind required of ecclesiastical courts of old. A state court cannot constitutionally get into the business of deciding which citizens are legitimate Jews, or not; or good Catholics, or not; or Baptists, etc. Religious determinations of this kind necessarily run afoul of the Establishment Clause.

These are not issues that can be decided without the state court becoming hopelessly entangled in

religion. For example, in this case, there is nothing contained in Max Feinberg's trust instruments indicating what degree of acceptance of Jewish tenets and adherence to Jewish rules is required to avoid or to bring about a forfeiture of Michele's interests. The Clause at issue simply purports to cause a forfeiture if Michele ever "marries outside of the Jewish faith," whatever that means. There are literally dozens of different branches within Judaism.[1] Whether the adherents of all of the branches can actually be considered Jews is a hotly contested matter even within the Jewish community, as can be inferred from the label for secular Jewish Israelis that is used by the Ultra-Orthodox: "Hebrew-speaking gentiles."

C. The Illinois Supreme Court's Ruling Infringes Upon Michele Trull's Constitutional Right To Marry

The Illinois Supreme Court's determination that the state can enforce the discriminatory wishes of her long deceased grandfather also infringes on Michele's constitutional right to marry.

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[1] Including: Conservative (Egalitarian), Conservative (Traditional), Ethiopian, Hebrew Israelite (a.k.a. the "Black Hebrews of Dimona"), Jewish Renewal, Messianism, Orthodox (Modern), Orthodox (Ultra – of which there are numerous strains, including Bianer, Bobov, Bostoner, Breslov, Dushinski, Ger, Karliner, Lubovitch, Munkacz, Puppa, Rimnitz, Sadiger, Satmar, and Vizhnitz, among others), Reconstructionism, Reform, Secular Humanism, and Sephardic.

This Court has held that "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking a statute prohibiting the formation of marriage between persons solely on the basis of racial classification). Illinois courts agree that marriage is a fundamental right and that lawful marriages should be encouraged. *See, e.g., Boynton v. Kusper*, 112 Ill. 2d 356, 494 N.E.2d 135, 140 (1986) ("freedom to marry has long been recognized as a fundamental right").

In this case, the Appellate Court recognized that the purpose of the Religious Preference Clause "was to influence the marriage decisions of Max's grandchildren based on a religious criterion and thus to discourage marriage by the grandchildren other than to those of the Jewish faith." (App 48). By enforcing the Clause, the State of Illinois infringes upon Michele Trull's constitutional right to marry.

D. State Enforcement Of Testamentary Restrictions Like This Will Result In Courts Being Required To Enforce Bigotry

In the Illinois Appellate Court, Justice Quinn wrote a specially concurring opinion stressing that if Religious Preference Clauses like the one at issue here are enforceable, courts could "just as well be required to enforce the worst bigotry imaginable." (App 51). Indeed, all groups of people who are targets

for discrimination need to worry about this sort of state enforced bigotry. Justice Quinn noted:

> As the dissent points out, the court in *In re Liberman*, 279 N.Y. 458, 18 N.E.2d 658 (1939), cited as persuasive authority cases which upheld conditions not to marry "Papists" or Scots. Logically, the dissent would uphold the "Jewish Clause" in the instant case if it had provided that any of Max and Erla's grandchildren would lose their bequests if they had married someone who was Jewish or black or a member of any other group Max did not like.

(App 51). As Justice Quinn observed, if the Religious Preference Clause is enforceable, state courts will be *required* to enforce any similar clause that seeks to discriminate against Jews, Catholics, homosexuals, African-Americans or any other group that may be subjected to discrimination.

To be sure, the Religious Preference Clause at issue here is rooted in religious bigotry. The appellants below tried to cast the Clause as a benign provision, nobly intended by Max Feinberg to preserve his 4,000 year old heritage by rewarding his descendants who chose to marry fellow Jews. (App 55). This characterization is belied by the Clause itself, which provides that Max's descendants will receive their inheritance if they remain single or if they marry a Jew. However, any grandchild (and that grandchild's descendants) will be deemed deceased if he or she marries outside the Jewish faith.

Obviously, Max Feinberg believed that his descendants would be better off never marrying at all rather than entering into an interfaith marriage. That private motive cannot be the basis for state action without violating the United States Constitution. Justice Quinn was right; *Shelley v. Kraemer* is applicable here. To hold otherwise would leave state courts with no choice but to enforce all sorts of "the worst bigotry imaginable." (App 51).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of Illinois.
In re ESTATE OF Max FEINBERG, Deceased
(Leila R. Taylor v. Michael B. Feinberg et al.
(Michael B. Feinberg, Appellant;
Michele Trull, Appellee)).

No. 106982.

Sept. 24, 2009.
Rehearing Denied Nov. 23, 2009.

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OPINION

Justice GARMAN delivered the judgment of the court, with opinion.

This case involves a dispute among the surviving children and grandchildren of Max and Erla Feinberg regarding the validity of a trust provision. The circuit court of Cook County found the trust provision unenforceable on the basis that it is contrary to the

public policy of the state of Illinois. The appellate court affirmed. 383 Ill.App.3d 992, 322 Ill.Dec. 534, 891 N.E.2d 549. Michael Feinberg, the Feinbergs' son and coexecutor of their estates, filed a petition for leave to appeal pursuant to Supreme Court Rule 315 (210 Ill.2d R. 315), which we allowed. We also allowed Agudath Israel of America, the National Council of Young Israel, and the Union of Orthodox Jewish Congregations of America to file a brief *amici curiae* pursuant to Supreme Court Rule 345 (210 Ill.2d R. 345).

For the reasons that follow, we reverse.

BACKGROUND

Max Feinberg died in 1986. He was survived by his wife, Erla, their adult children, Michael and Leila, and five grandchildren.

Prior to his death, Max executed a will and created a trust. Max's will provided that upon his death, all of his assets were to "pour over" into the trust, which was to be further divided for tax reasons into two trusts, "Trust A" and "Trust B." If she survived him, Erla was to be the lifetime beneficiary of both trusts, first receiving income from Trust A, with a limited right to withdraw principal. If Trust A were exhausted, Erla would then receive income from Trust B, again with a limited right to withdraw principal.

Upon Erla's death, any assets remaining in Trust A after the payment of estate taxes were to be combined with the assets of Trust B. The assets of Trust B were then to be distributed to Max's descendants in accordance with a provision we shall call the "beneficiary restriction clause." This clause directed that 50% of the assets be held in trust for the benefit of the then-living descendants of Michael and Leila during their lifetimes. The division was to be on a *per stirpes* basis, with Michael's two children as lifetime beneficiaries of one quarter of the trust and Leila's three children as lifetime beneficiaries of the other one quarter of the trust. However, any such descendant who married outside the Jewish faith or whose non-Jewish spouse did not convert to Judaism within one year of marriage would be "deemed deceased for all purposes of this instrument as of the date of such marriage" and that descendant's share of the trust would revert to Michael or Leila.

In addition, the trust instrument gave Erla a limited testamentary power of appointment over the distribution of the assets of both trusts and a limited lifetime power of appointment over the assets of Trust B. Under the limiting provision, Erla was allowed to exercise her power of appointment only in favor of Max's descendants. Thus, she could not name as remaindermen individuals who were not Max's descendants or appoint to a charity. The parties dispute whether Erla's power of appointment was limited to those descendants not deemed deceased under the beneficiary restriction clause. The trial court did not

make a finding on this question and the appellate court did not discuss it.

Erla exercised her lifetime power of appointment over Trust B in 1997, directing that, upon her death, each of her two children and any of her grandchildren who were not deemed deceased under Max's beneficiary restriction clause receive $250,000. In keeping with Max's original plan, if any grandchild was deemed deceased under the beneficiary restriction clause, Erla directed that his or her share be paid to Michael or Leila.

By exercising her power of appointment in this manner, Erla revoked the original distribution provision and replaced it with a plan that differs from Max's plan in two significant respects. First, Erla altered the distribution scheme from *per stirpes* to *per capita,* permitting each of the grandchildren to take an equal share, rather than favoring Michael's two children over Leila's three children. Second, Erla designated a fixed sum to be distributed to each eligible descendant at the time of her death, replacing Max's plan for a lifetime trust for such descendants. The record suggests that Erla's gifts will deplete the corpus of the trust, leaving no trust assets subject to distribution under Max's original plan. Thus, while Erla retained Max's beneficiary restriction clause, his distribution provision never became operative.

All five grandchildren married between 1990 and 2001. By the time of Erla's death in 2003, all five grandchildren had been married for more than one

year. Only Leila's son, Jon, met the conditions of the beneficiary restriction clause and was entitled to receive $250,000 of the trust assets as directed by Erla.

This litigation followed, pitting Michael's daughter, Michele, against Michael, coexecutor of the estates of both Max and Erla.

The trial court invalidated the beneficiary restriction clause on public policy grounds. A divided appellate court affirmed, holding that "under Illinois law and under the Restatement (Third) of Trusts, the provision in the case before us is invalid because it seriously interferes with and limits the right of individuals to marry a person of their own choosing." 383 Ill.App.3d at 997, 322 Ill.Dec. 534, 891 N.E.2d 549. In reaching this conclusion, the appellate court relied on decisions of this court dating back as far as 1898 and, as noted, on the Restatement (Third) of Trusts.

ISSUE PRESENTED

As a threshold matter, we must clarify the issue presented. We need not consider whether Max's original testamentary scheme is void as a matter of public policy because Erla altered his scheme in 1997. Indeed, she could have done so again at any time before her death in 2003, exercising her lifetime or testamentary powers of appointment in any number of ways. For example, she could have named her grandson, Jon, as the sole beneficiary of the entire trust, or excluded the grandchildren entirely,

appointing the entire corpus of the trust to Michael and Leila.

Indeed, counsel for Michele acknowledged at oral argument that Max and Erla could have accomplished the goal of benefitting only those grandchildren who married within their religious tradition by individually naming those grandchildren as beneficiaries of the will or the trust, without implicating public policy. Counsel argued that the violation of public policy occurred when Max used a religious description to define a class or category of descendants he wished to benefit, rather than mention them by name.

Of course, at the time Max prepared his estate plan, his grandchildren were too young to marry and it was possible that more grandchildren might have been born before the trust provisions took effect. As a result, Max could not have accomplished his purpose in the manner suggested by Michele. Even by the time Erla exercised her power of appointment, not all of the grandchildren had married.

Thus, the question we must answer is whether the holder of a power of appointment over the assets of a trust may, without violating the public policy of the state of Illinois, direct that the assets be distributed at the time of her death to then-living descendants of the settlor, deeming deceased any descendant who has married outside the settlor's religious tradition. In effect, we are not called upon to consider the validity of Max's estate plan as a whole,

which would have continued to hold the assets in trust for the benefit of the grandchildren only so long as they complied with the restriction. Rather, we must assess Max's beneficiary restriction clause in conjunction with Erla's directions for distribution.

When the issue is clarified in this way, it becomes apparent that many of the arguments raised by Michele are not relevant. For example, under Max's plan, an unmarried grandson would have begun to receive distributions from Trust B upon Erla's death, only to forfeit further such payments if he were to marry a non-Jewish woman who did not convert to Judaism within one year. We need not decide if such a provision would violate public policy because no such provision is implicated in the present case.

Michele also suggests that a granddaughter who was married to a non-Jewish man at the time of Erla's death might subsequently divorce and remarry, this time to a Jewish spouse, and make a claim upon the trust. This circumstance would raise the issue of whether such a descendant, previously deemed deceased, would be "resurrected." Such an occurrence would require construction of the language of the trust document. Under Erla's plan, however, this circumstance cannot arise because a fixed amount became distributable upon her death only to those grandchildren who then met the requirements previously set by Max.

Similarly, Michele's argument that the beneficiary restriction clause is invalid because a court

might be called upon to determine whether the spouse of a particular descendant is or is not Jewish is not well taken. It is undisputed in the present case that only one of the five grandchildren meets the requirements established by Max.

STANDARD OF REVIEW

This court has not had occasion to identify the applicable standard of review on the question of whether a provision in a trust document or will is void as a matter of public policy. It is clear, however, that such findings are subject to *de novo* review, because public policy is necessarily a question of law. *Holstein v. Grossman,* 246 Ill.App.3d 719, 726, 186 Ill.Dec. 592, 616 N.E.2d 1224 (1993), citing *Zeigler v. Illinois Trust & Savings Bank,* 245 Ill. 180, 91 N.E. 1041 (1910). This conclusion is consistent with the well-established principle that whether a provision in a contract, insurance policy, or other agreement is invalid because it violates public policy is a question of law, which we review *de novo. O'Hara v. Ahlgren, Blumenfeld & Kempster,* 127 Ill.2d 333, 130 Ill.Dec. 401, 537 N.E.2d 730 (1989) (affirming grant of summary judgment on basis that fee-sharing agreement offended public policy).

ANALYSIS

Michael argues before this court that the beneficiary restriction clause in his father's trust was intended "to encourage and support Judaism and

preservation of Jewish culture in his own family," and that it was not binding upon Erla, who exercised her power of appointment consistently with the provision because it expressed her intent as well as Max's. Michael argues, further, that even if Max's beneficiary restriction was not revocable by Erla, the provision does not violate the public policy of this state when it is given effect via his mother's distribution scheme. He asserts that the distribution scheme is a valid partial restraint on marriage of a type that has long been enforced in Illinois and elsewhere. According to Michael, the beneficiary restriction clause has no prospective effect that might subsequently influence a descendant's decisions regarding marriage or divorce because, upon Erla's death, no contingencies remained. He distinguishes the cases relied upon by the appellate court and urges this court to reject the cited Restatement provision as not accurately stating Illinois law.

Michele defends the Restatement provision and argues that this case comes within a line of cases dating back to 1898 in which this court invalidated testamentary provisions that operated to discourage the subsequent lawful marriage by a legatee or to encourage a legatee to obtain a divorce. Specifically, she argues that under *Ransdell v. Boston*, 172 Ill. 439, 50 N.E. 111 (1898), testamentary restrictions on marriage are valid only if they operate to benefit the intended beneficiary. Further, she argues that enforcement of the clause would violate both state and federal constitutions and that it violates public policy

by offering a financial inducement to embrace a particular religion.

We note that this case involves more than a grandfather's desire that his descendants continue to follow his religious tradition after he is gone. This case reveals a broader tension between the competing values of freedom of testation on one hand and resistance to "dead hand" control on the other. This tension is clearly demonstrated by the three opinions of the appellate court. The authoring justice rejected the argument that the distribution scheme is enforceable because it operated at the time of Erla's death and could not affect future behavior, stating that its "clear intent was to influence the marriage decisions of Max's grandchildren based on a religions criterion." 383 Ill.App.3d at 997, 322 Ill.Dec. 534, 891 N.E.2d 549. The concurring justice opined that while such restrictions might once have been considered reasonable, they are no longer reasonable. 383 Ill.App.3d at 1000, 322 Ill.Dec. 534, 891 N.E.2d 549 (Quinn, P.J., specially concurring). The dissenting justice noted that under the facts of this case, grandchildren who had complied with the restrictions would "immediately receive their legacy" upon Erla's death (383 Ill.App.3d at 1000, 322 Ill.Dec. 534, 891 N.E.2d 549 (Greiman, J., dissenting)), and that the weight of authority is that a testator has a right to make the distribution of his bounty conditional on the beneficiary's adherence to a particular religious faith (383 Ill.App.3d at 1002, 322 Ill.Dec. 534, 891 N.E.2d 549).

We, therefore, begin our analysis with the public policy surrounding testamentary freedom and then consider public policy pertaining to testamentary or trust provisions concerning marriage.

When we determine that our answer to a question of law must be based on public policy, it is not our role to make such policy. Rather, we must discern the public policy of the state of Illinois as expressed in the constitution, statutes, and long-standing case law. *O'Hara,* 127 Ill.2d at 341, 130 Ill.Dec. 401, 537 N.E.2d 730. We will find a contract provision against public policy only "'"if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or is at war with the interests of society or is in conflict with the morals of the time."'" *Vine Street Clinic v. HealthLink, Inc.,* 222 Ill.2d 276, 296, 305 Ill.Dec. 617, 856 N.E.2d 422 (2006), quoting *E & B Marketing Enterprises, Inc. v. Ryan,* 209 Ill.App.3d 626, 630, 154 Ill.Dec. 339, 568 N.E.2d 339 (1991), quoting *Marvin N. Benn & Associates, Ltd. v. Nelsen Steel & Wire, Inc.,* 107 Ill.App.3d 442, 446, 63 Ill.Dec. 251, 437 N.E.2d 900 (1982). Thus,

> "In deciding whether an agreement violates public policy, courts determine whether the agreement is so capable of producing harm that its enforcement would be contrary to the public interest. [Citation.] The courts apply a strict test in determining when an

> agreement violates public policy. [Citation.] The power to invalidate part or all of an agreement on the basis of public policy is used sparingly because private parties should not be needlessly hampered in their freedom to contract between themselves. [Citation.] Whether an agreement is contrary to public policy depends on the particular facts and circumstances of the case." *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.*, 181 Ill.2d 214, 226, 229 Ill.Dec. 496, 692 N.E.2d 269(1998).

Because, as will be discussed below, the public policy of this state values freedom of testation as well as freedom of contract, these same principles guide our analysis in the present case.

Public Policy Regarding Freedom of Testation

Neither the Constitution of the United States nor the Constitution of the State of Illinois speaks to the question of testamentary freedom. However, our statutes clearly reveal a public policy in support of testamentary freedom.

The Probate Act places only two limits on the ability of a testator to choose the objects of his bounty. First, the Act permits a spouse to renounce a testator's will, "whether or not the will contains any provision for the benefit of the surviving spouse." 755 ILCS 5/2-8 (West 2008). Thus, absent a valid prenuptial or postnuptial agreement (*see, e.g., Golden v. Golden*, 393 Ill. 536, 66 N.E.2d 662 (1946) (wife can effectively

bind herself to accept provisions of husband's will, thereby estopping her from renouncing the will after his death)), the wishes of a surviving spouse can trump a testator's intentions. Second, a child born to a testator after the making of a will is "entitled to receive the portion of the estate to which he would be entitled if the testator died intestate," unless provision is made in the will for the child or the will reveals the testator's intent to disinherit the child. 755 ILCS 5/4-10 (West 2008).

The public policy of the state of Illinois as expressed in the Probate Act is, thus, one of broad testamentary freedom, constrained only by the rights granted to a surviving spouse and the need to expressly disinherit a child born after execution of the will if that is the testator's desire.

Under the Probate Act, Max and Erla had no obligation to make any provision at all for their grandchildren. Indeed, if Max had died intestate, Erla, Michael, and Leila would have shared his estate (755 ILCS 5/2-1(a) (West 2008)), and if Erla had died intestate, only Michael and Leila would have taken (755 ILCS 5/2-1(b) (West 2008)). Surely, the grandchildren have no greater claim on their grandparents' testate estates than they would have had on intestate estates.

Similarly, under the Trusts and Trustees Act, "[a] person establishing a trust may specify in the instrument the rights, powers, duties, limitations and immunities applicable to the trustee, beneficiary and

others and those provisions where not otherwise contrary to law shall control, notwithstanding this Act." 760 ILCS 5/3 (West 2008). Thus, the legislature intended that the settlor of a trust have the freedom to direct his bounty as he sees fit, even to the point of giving effect to a provision regarding the rights of beneficiaries that might depart from the standard provisions of the Act, unless "otherwise contrary to law."

Another legislative enactment that reveals a strong public policy of freedom of testation was the adoption, in 1969, of the Statute Concerning Perpetuities (765 ILCS 305/1 *et seq.* (West 2008)), for the purpose of modifying the common law rule that a will or trust provision that violated the rule against perpetuities was void *ab initio*. 765 ILCS 305/2 (West 2008). The statute permits the settlor of a trust to create a "qualified perpetual trust" by including in the instrument a provision that the rule against perpetuities does not apply and by granting certain specified powers to the trustee. 765 ILCS 305/3(a-5), 4(a)(8) (West 2008). The statute also specifies other circumstances under which the rule shall not apply. 765 ILCS 305/4(a)(1) through (a)(7) (West 2008). In addition, the statute adopts a set of rules to be applied when determining whether an interest violates the rule against perpetuities. 765 ILCS 305/4 (c)(1) through (c)(3) (West 2008). With regard to trusts, the statute provides that a trust containing a provision that would violate the rule against perpetuities, as modified by the statute, shall terminate 21 years

after the death of the last surviving beneficiary who was living at the beginning of the perpetuities period (765 ILCS 305/5(a)(A) (West 2008)) or else at the end of the 21-year perpetuities period if no beneficiary was living when the period began to run (765 ILCS 305/5(a)(B) (West 2008)). Thus, the trust is not rendered void *ab initio,* but is merely terminated by operation of law at the conclusion of the perpetuities period.

Also, in 1953, the legislature adopted the Rule in Shelley's Case Abolishment Act (765 ILCS 345/1 *et seq.* (West 2008)), to abolish the common law rule that a life estate to A, with a remainder to A's heirs, shall pass to A in fee simple.

As demonstrated by the Probate Act, the Trusts Act, the Statute Concerning Perpetuities, and the Rule in Shelley's Case Abolishment Act, the public policy of the state of Illinois protects the ability of an individual to distribute his property, even after his death, as he chooses, with minimal restrictions under state law.

Our case law also demonstrates the existence of a public policy favoring testamentary freedom, reflected in the many cases in which a court strives to discover and to give effect to the intent of a deceased testator or settlor of a trust. *See, e.g., Harris Trust & Savings Bank v. Donovan,* 145 Ill.2d 166, 172, 163 Ill.Dec. 854, 582 N.E.2d 120 (1991) ("The first purpose in construing a trust is to discover the settlor's intent from the trust as a whole, which the court will

effectuate if it is not contrary to public policy"); *Harris Trust & Savings Bank v. Beach*, 118 Ill.2d 1, 3, 112 Ill.Dec. 224, 513 N.E.2d 833 (1987) ("In construing either a trust or a will the challenge is to find the settlor's or testator's intent and, provided that the intention is not against public policy, to give it effect").

The record, via the testimony of Michael and Leila, reveals that Max's intent in restricting the distribution of his estate was to benefit those descendants who opted to honor and further his commitment to Judaism by marrying within the faith. Max had expressed his concern about the potential extinction of the Jewish people, not only by holocaust, but by gradual dilution as a result of intermarriage with non-Jews. While he was willing to share his bounty with a grandchild whose spouse converted to Judaism, this was apparently as far as he was willing to go.

There is no question that a grandparent in Max's situation is entirely free during his lifetime to attempt to influence his grandchildren to marry within his family's religious tradition, even by offering financial incentives to do so. The question is, given our public policy of testamentary freedom, did Max's beneficiary restriction clause as given effect by Erla's appointment violate any other public policy of the state of Illinois, thus rendering it void?

Public Policy Regarding Terms Affecting Marriage or Divorce

The contrary law relied upon by the appellate court to invalidate Max's beneficiary restriction clause is found in three decisions of this court: *Ransdell,* 172 Ill. 439, 50 N.E. 111, *Winterland v. Winterland,* 389 Ill. 384, 59 N.E.2d 661 (1945), and *Estate of Gerbing,* 61 Ill.2d 503, 337 N.E.2d 29 (1975) (which overruled *Winterland* in part). The appellate court concluded that the "language and circumstances" of the testamentary provisions in these cases, "which Illinois courts have found to be against public policy, are strikingly similar to the instant case." 383 Ill.App.3d at 996, 322 Ill.Dec. 534, 891 N.E.2d 549. Specifically, the appellate court invoked the "principle that testamentary provisions are invalid if they discourage marriage or encourage divorce." 383 Ill.App.3d at 995, 322 Ill.Dec. 534, 891 N.E.2d 549.

In *Ransdell,* the testator's will included provisions for his wife, his son, and his daughter. At the time the will was executed, the son and his wife were separated and cross-suits for divorce were pending. The father's bequest to the son provided that the property be held in trust, giving him use and income of the land for life, or "until such time as he * * * shall become sole and unmarried," at which time the trustee was to convey title to the land to him in fee simple. *Ransdell,* 172 Ill. at 440, 50 N.E. 111. If the son died childless while still married to the wife, the land was to go to other devisees. Several years after the father's death, the son, who was still married but

living apart from his wife, challenged the provision on public policy grounds. The circuit court granted judgment for the defendants and this court affirmed.

This court acknowledged the long-standing rule that conditions annexed to a gift that have the tendency to induce spouses to divorce or to live separately are void on grounds of public policy. *Ransdell,* 172 Ill. at 445, 50 N.E. 111. However, the testator's purpose in this case "was simply to secure the gift to his son in the manner which, in his judgment, would render it of the greatest benefit to him in view of the relations then existing between him and his wife" (*Ransdell,* 172 Ill. at 445, 50 N.E. 111), which were strained, to say the least. "Certainly," this court noted, "it cannot be said that the condition tended to encourage either the separation or the bringing of a divorce suit, both having taken place long prior to the execution of the will." *Ransdell,* 172 Ill. at 446, 50 N.E. 111.

This court weighed two potentially competing public policies, stating that it was "of the first importance to society that contract and testamentary gifts which are calculated to prevent lawful marriages or to bring about the separation or divorcement of husbands and wives should not be upheld." *Ransdell,* 172 Ill. at 446, 50 N.E. 111. On the other hand, "it is no less important that persons of sound mind and memory, free from restraint and undue influence, should be allowed to dispose of their property by will, with such limitations and conditions as they believe for the best interest of their donees."

Ransdell, 172 Ill. at 446, 50 N.E. 111. Because the testator had not disinherited his son if he remained married, but made one provision for him in case he remained married (a life estate) and a different provision if he divorced (taking title in fee simple), the condition was not contrary to public policy.

Finally, this court distinguished between a condition subsequent (for example, if the will devised property to the beneficiary in trust for life, subject to divestment if he married), and a condition precedent, which directs that upon the fulfillment of the condition, ownership of the property is to vest in the beneficiary. *Ransdell,* 172 Ill. at 447, 50 N.E. 111. The condition subsequent, such as one that would prohibit marriage generally, would be void and the donee would retain the property, unaffected by the violation of the condition. A condition precedent would be given effect, because until the condition was met, the beneficiary's interest was a mere expectancy. *Ransdell,* 172 Ill. at 447-48, 50 N.E. 111.

The appellate court cited *Ransdell* for the "general rule that testamentary provisions which act as a restraint upon marriage or which encourage divorce are void as against public policy" and distinguished *Ransdell* from the present case on the basis that the Ransdells' marriage was "already in disrepair" at the time the will was executed. 383 Ill.App.3d at 994, 322 Ill.Dec. 534, 891 N.E.2d 549. The appellate court noted that subsequent Illinois cases, however, have "reaffirmed the underlying principle." 383 Ill.App.3d at 995, 322 Ill.Dec. 534, 891 N.E.2d 549.

One such case was *Winterland,* in which the testator created a trust for his wife that, upon her death, was to be distributed equally to their 11 children. However, in a later codicil, the testator directed that the share intended for their son, George, was to be held in trust for him "'so long as he may live or until his present wife shall have died or been separated from him by absolute divorce.'" *Winterland,* 389 Ill. at 385, 59 N.E.2d 661. George predeceased his wife and she and their son challenged the codicil as promoting divorce, contrary to good morals, and against public policy. *Winterland,* 389 Ill. at 386, 59 N.E.2d 661. This court distinguished *Ransdell* on the basis that the couple's separation was "already an accomplished fact and a divorce suit was then pending" at the time the testator made his will. *Winterland,* 389 Ill. at 387, 59 N.E.2d 661. But where no separation was contemplated, the "natural tendency of the provision" was "to encourage divorce." For that reason, the provision was void. *Winterland,* 389 Ill. at 387-88, 59 N.E.2d 661. This court announced that it is "the public policy of this state to safeguard and protect the marriage relation, and this court will hold as contrary to that policy and void any testamentary provision tending to disturb or destroy an existing marriage." *Winterland,* 389 Ill. at 387, 59 N.E.2d 661.

This court further found that the codicil established two separate and divisible conditions upon which the trust would be distributed to George. First, George's life estate was to continue until the death of

his wife; second, his life estate would terminate upon their absolute divorce. This court rejected the argument that the life estate itself failed and that title to the property vested in George upon his father's death. Rather, while the second condition was void, the first condition was not and, thus, could be given effect. *Winterland,* 389 Ill. at 388, 59 N.E.2d 661.

In *Gerbing,* this court considered the validity of a provision in a testamentary trust that would have terminated the trust and distributed the corpus to the testator's son in the event that his wife predeceased him or the couple divorced and remained divorced for two years. *Gerbing,* 61 Ill.2d at 505, 337 N.E.2d 29. This court restated the general principle that "a devise or bequest, the tendency of which is to encourage divorce or bring about a separation of husband and wife is against public policy." *Gerbing,* 61 Ill.2d at 507, 337 N.E.2d 29. However, if the "dominant motive of the testator is to provide support in the event of such separation or divorce the condition is valid." *Gerbing,* 61 Ill.2d at 507, 337 N.E.2d 29. Further, unless the couple was separated or a divorce was pending at the time the will was executed, the "exception to the general rule announced in *Ransdell*" was not applicable. *Gerbing,* 61 Ill.2d at 508, 337 N.E.2d 29. This court found the provision void, but declined to sever the two conditions, as it had done in *Winterland.* Finding that it was the testator's general intent to benefit her son and that she would have preferred that he take the corpus of the trust, even if he remained married, rather than have him take nothing,

this court found the entire provision void, overruling *Winterland* to the extent it held otherwise. *Gerbing,* 61 Ill.2d at 512, 337 N.E.2d 29.

In the present case, the appellate court found the "language and circumstances" of these three cases "strikingly similar" to the present case and saw "no reason to depart from this well-established principle" of these cases. 383 Ill.App.3d at 996, 322 Ill.Dec. 534, 891 N.E.2d 549. We disagree with the appellate court's conclusion regarding the similarity of the present case to the cited cases. The beneficiary restriction clause as given effect by Erla's distribution scheme does not implicate the principle that trust provisions that encourage divorce violate public policy. That is, the present case does not involve a testamentary or trust provision that is "capable of exerting * * * a disruptive influence upon an otherwise normally harmonious marriage" by causing the beneficiary to choose between his or her spouse and the distribution. *Gerbing,* 61 Ill.2d at 508, 337 N.E.2d 29. The challenged provision in the present case involves the decision to marry, not an incentive to divorce. This court has considered the validity of restrictions affecting marriage in cases going back as far as 1857.

In *Shackelford v. Hall,* 19 Ill. 212 (1857), the testator, Hall, left his estate to his wife for life or until she remarried, with the remainder to his four children, subject to the condition that they not marry before the age of 21. Any child who married before his or her twenty-first birthday was to receive one dollar

only. The only daughter, Eliza, married four months before her twenty-first birthday, with the approval of her eldest brother, the executor of their father's estate. This court described the provision as a "devise with a condition subsequent," because the remainder interest vested in the four children immediately upon the death of the testator, "subject to be defeated by their marriage before they should attain that age." *Shackelford*, 19 Ill. at 213. This court noted that:

> "whoever will take the trouble to examine this branch of the law attentively, will find that the testator may impose reasonable and prudent restraints upon the marriage of the objects of his bounty, by means of conditions precedent, or subsequent, or by limitations, while he may not, with one single exception, impose perpetual celibacy upon the objects of his bounty, by means of conditions subsequent or limitations. That exception is in the case of a husband in making bequests or legacies to his own wife. He may rightfully impose the condition of forfeiture upon her subsequent marriage." *Shackelford*, 19 Ill. at 214-15.

As for other conditions affecting marriage that might be imposed by a testator, this court said that:

> "[a]n examination of the subject, will show that the courts have very rarely held such condition void, although it might appear harsh, arbitrary and unreasonable, so as it did not absolutely prohibit the marriage of the party, within the period wherein issue of

the marriage might be expected. It is enough for our present purpose, and we will go no further now, for it is not necessary, that it has been nowhere held, or pretended, that an absolute prohibition of marriage till twenty-one years of age is not reasonable and lawful, and must not be upheld, as a good condition, the violation of which may defeat a vested estate. The condition, then, annexed to this devise, was proper, reasonable and lawful, and its violation must be held to have forfeited the estate devised, unless it can be saved by some other equally well settled principle of law." *Shackelford,* 19 Ill. at 215.

Further:

"The facts of the case show, that all of the devisees of the estate in remainder, now in controversy, were the children and heirs at law of the testator, *and as such heirs at law, had expectations of this estate.* In the absence of the will, each would have been entitled to his or her respective proportions of it, according to our statute of descent. *When such is the case,* the condition subsequent, the breach of which shall divest the estate which *has become vested in the devisee by the will,* must be shown to have been brought home to the knowledge of the devisee, before the breach, in order to mark the forfeiture." (Emphases added.) *Shackelford,* 19 Ill. at 215-16.

In the end, this court found that the marriage of Hall's daughter prior to her twenty-first birthday did

not divest her of the remainder interest conveyed to her upon her father's death. The basis for this decision was not that her father's partial restraint upon marriage was invalid, but that her remainder interest vested upon his death and could not be divested by a subsequent act on her part, absent a showing that she had notice of the condition subsequent. Other factors supporting this result were that she would have been one of her father's heirs at law should he have died intestate and that her brother, the executor, had unclean hands:

> "And this rule is in harmony with the general principles of law, which always lean hard against a forfeiture of estates once vested, and that it will not allow such forfeiture, where there has been no laches or misconduct. In the case before us, we must assume that the *defendant did not know of the existence of the will, and much less of the condition which it contained, that she should not marry till she was twenty-one years of age, under the penalty of forfeiting her interest in her father's estate.* In ignorance of the will, she supposed she was entitled to take as heir without any condition. When we look at this case as it is presented by the record, we see it would be a monstrous piece of injustice to enforce this forfeiture against her. Here was her elder brother, who was an executor named in the will, knowing of the condition of forfeiture, had an interest in keeping it from her, that she might, by doing the prohibited act, incur the forfeiture, that her

> portion might go to himself and the other heirs of the testator. Under the influence of this direct interest, he suffers her to go on in ignorance of the will, and marry only four months before she attained the age of twenty-one years, and now he comes forward and claims the benefit of the forfeiture, and insists upon depriving her of the portion devised to her by the will. To sustain this claim, would be to offer a premium for the commission of the most heartless frauds. * * * We have not the least doubt that, upon the soundest principles of law and morality, she must take the estate devised, discharged of the condition." (Emphasis added.) *Shackelford*, 19 Ill. at 217-18.

In the present case, Michael argues that the beneficiary restriction clause is a similar "reasonable and prudent restraint" that does not operate as a complete restraint upon marriage. Rather, the clause disqualifies from receipt of a share of the trust assets any grandchild who has chosen to marry outside the religious tradition their grandparents valued so highly.

More importantly, we note that, unlike Eliza Hall, the grandchildren did not receive a vested interest in the trust upon Max's death. By creating a power of appointment in Erla, Max created a situation in which the interests of the grandchildren were contingent on whether and in what manner she would exercise her lifetime and testamentary powers of appointment. Thus, the grandchildren had a mere expectancy that

they might receive some portion of the remainder at the conclusion of Erla's life estate. No one had a vested interest in the remainder of the trust assets until Erla's death resolved all contingencies. Further, unlike Hall's daughter, the grandchildren in the present case were not Max's or Erla's heirs at law. Finally, while the record is unclear whether any or all of the grandchildren were aware of the existence of the beneficiary restriction clause, because they had no vested interest to protect, they were not entitled to notice of the condition.

More recently, the appellate court upheld the validity of a testamentary provision regarding the marriage of the intended legatee. In *In re Estate of Gehrt,* 134 Ill.App.3d 308, 89 Ill.Dec. 265, 480 N.E.2d 151 (1985), the testator, Forrest Gehrt, originally left a portion of his estate to six named individuals who were the children of Edna Bocock, apparently his deceased sister. Upon the death of one of these individuals, Harold Bocock, he executed a codicil leaving the portion originally intended for Harold to his widow, Betty, provided that at the time of Forrest's death, she remained unmarried. If, at the time of Forrest's death, it was determined that Betty had remarried, the share was to go to Harold's five siblings. *Estate of Gehrt,* 134 Ill.App.3d at 309, 89 Ill.Dec. 265, 480 N.E.2d 151.

Betty remarried and, upon Forrest's death, sought Harold's share of the estate. The parties agreed that the condition operated as a condition precedent. Betty argued that it constituted an invalid restraint on

marriage and asked that it be declared void as against public policy. The executor argued that the condition did not operate as a restraint because the interest "either vests or not at the date of the death of the testator depending on [Betty's] marital status at the time, not at some later time." *Estate of Gehrt,* 134 Ill.App.3d at 310, 89 Ill.Dec. 265, 480 N.E.2d 151.

The appellate court invoked a rule of reasonableness, quoting a case from the state of Louisiana in support of such a rule:

> "'[C]onceding, without deciding, that a legacy conditioned upon the legatee remaining unmarried is against the public policy of this State, it is apt to observe here that the provision under consideration is not one forbidding the donee to marry during her lifetime or even for a fixed period of time, nor one that directs the legacy shall lapse in case the legatee should marry in the future, but rather one that is conditioned upon her status at the time of the testator's death. Certainly, such a provision is not against good morals, and we know of no law prohibiting the same.'" *Estate of Gehrt,* 134 Ill.App.3d at 311, 89 Ill.Dec. 265, 480 N.E.2d 151, quoting *Succession of Ruxton,* 226 La. 1088, 1091, 78 So.2d 183, 184 (1955).

Applying this principle to the *Gehrt* estate, the appellate court noted the well-established principle that a will speaks as of the date of death of the testator. *Estate of Gehrt,* 134 Ill.App.3d at 310, 89

Ill.Dec. 265, 480 N.E.2d 151. Thus, the court observed:

> "[T]he testator, Forrest L. Gehrt, could have, for any reason, changed his codicil at any time prior to his death. He could have, at the time of plaintiff's remarriage, immediately executed another codicil cancelling the gift to the plaintiff, and could have given that portion of property to others. He can validly accomplish the same result by using the language that he did in the codicil in this case." *Estate of Gehrt,* 134 Ill.App.3d at 311, 89 Ill.Dec. 265, 480 N.E.2d 151.

The appellate court then quoted this court's opinion in *Ransdell*:

> "While it is of the first importance to society that contract and testamentary gifts which are calculated to prevent lawful marriages or to bring about the separation or divorcement of husbands and wives should not be upheld, it is no less important that persons of sound mind and memory, free from restraint and undue influence, should be allowed to dispose of their property by will, with such limitations and conditions as they believe for the best interest of their donees." *Ransdell,* 172 Ill. at 446, 50 N.E. 111.

We conclude, reading *Ransdell, Shackelford, Gerbing,* and *Gehrt* together, that no interest vested in the Feinbergs' grandchildren at the time of Max's death because the terms of his testamentary trust were subject to change until Erla's death. Because

they had no vested interest that could be divested by their noncompliance with the condition precedent, they were not entitled to notice of the existence of the beneficiary restriction clause. Further, because they were not the Feinbergs' heirs at law, the grandchildren had, at most, a mere expectancy that failed to materialize for four of them when, at the time of Erla's death, they did not meet the condition established by Max.

Applicability of Restatement (Third) of Trusts

In reaching its decision, the appellate court also relied on section 29 of the Restatement (Third) of Trusts, and the explanatory notes and comments thereto. 383 Ill.App.3d at 997, 322 Ill.Dec. 534, 891 N.E.2d 549.

Since the Restatement (Second) of Trusts was adopted in 1959, this court has, on several occasions, cited various sections with approval. *See, e.g., Eychaner v. Gross,* 202 Ill.2d 228, 255, 269 Ill.Dec. 80, 779 N.E.2d 1115 (2002) (requirements for creation of a trust). We have not yet had reason to consider whether any section of the Restatement (Third) of Trusts, which was adopted in 2003, is an accurate expression of Illinois law and we need not do so in this case.

The validity of a trust provision is not at issue, as the distribution provision of Max's trust was revoked when Erla exercised her power of appointment. Her distribution scheme was in the nature of a

testamentary provision, which operated at the time of her death to determine who would be entitled to a $250,000 distribution.

The appellate court mistakenly compared the present case to an illustration accompanying Comment *j* to section 29 of the Restatement (Third) of Trusts. 383 Ill.App.3d at 997, 322 Ill.Dec. 534, 891 N.E.2d 549. The illustration concerns a trust created by an aunt to benefit her nephew, who was to receive discretionary payments until age 18, and all income and discretionary payments until age 30, at which time he would receive an outright distribution of all trust property. However, all of his rights under the trust would end if, before the trust terminated on his thirtieth birthday, he married "a person who is not of R Religion." If he violated this condition, the remainder of the trust would be given to a college. The drafters of the Restatement called this an "invalid restraint on marriage," and stated that the invalid condition and the gift over to the college should not be given effect. Restatement (Third) of Trusts § 29, Explanatory Notes, Comment *j*, Illustration 3, at 62-64 (2003).

This illustration is similar to Max's original trust provision. Under his plan, the grandchildren who were not "deemed deceased" at the time of Erla's death would receive distributions from the trust for life, subject to termination if they should violate the marriage restriction. Erla's scheme, however, does not operate prospectively to encourage the grandchildren to make certain choices regarding marriage.

It operated on the date of her death to determine which, if any, of the grandchildren qualified for distribution on that date. The condition was either met or it was not met. There was nothing any of the grandchildren could have done at that time to make themselves eligible or ineligible for the distribution.

As this court noted in *Ransdell,* a condition precedent, even if a "complete restraint" on marriage, "will, if broken, be operative and prevent the devise from taking effect." However, "[w]hen the condition is subsequent and void it is entirely inoperative, and the donee retains the property unaffected by its breach." *Ransdell,* 172 Ill. at 447, 50 N.E. 111, quoting 2 Pomeroy, Equity Jurisprudence § 933B (1881).

Max's will and trust created no vested interests in the children or grandchildren because Erla retained a power of appointment until her death. No vested interests were created in 1997 by Erla's exercise of her power of appointment. Her actions created a mere expectancy, contingent on her dying without further amending the distribution scheme. Because no interest vested in any of the grandchildren until Erla's death, her appointment created a condition precedent. As we noted in *Ransdell,* under these circumstances, even a complete restraint on marriage (*i.e.,* distribution only to unmarried grandchildren) would be operative.

Thus, this is not a case in which a donee, like the nephew in the illustration, will retain benefits under a trust only so long as he continues to comply with

the wishes of a deceased donor. As such, there is no "dead hand" control or attempt to control the future conduct of the potential beneficiaries. Whatever the effect of Max's original trust provision might have been, Erla did not impose a condition intended to control future decisions of their grandchildren regarding marriage or the practice of Judaism; rather, she made a bequest to reward, at the time of her death, those grandchildren whose lives most closely embraced the values she and Max cherished.

The trial court and the appellate court erred by finding a violation of public policy in this case. While the beneficiary restriction clause, when given effect via Erla's distribution provision, has resulted in family strife, it is not "so capable of producing harm that its enforcement would be contrary to the public interest." *Kleinwort Benson,* 181 Ill.2d at 226, 229 Ill.Dec. 496, 692 N.E.2d 269.

Other Issues

The several other arguments made by Michele do not alter our conclusion.

First, Michele argues that even a partial restriction on marriage is void unless the "dominant motive for the restriction was to provide a benefit to the donee." She cites *Ransdell* and *Gerbing,* neither of which involved a restraint upon marriage, in support of this assertion. We concluded above, however, that the beneficiary restriction clause does not operate as a restriction on marriage because it operated only

upon Erla's death to determine which grandchildren, if any, would share in the proceeds of the trust. Until that time, none of Max's heirs had a vested interest in the proceeds of the trust, over which Erla held a limited power of appointment. Michele's choices regarding when to marry and whom to marry were entirely unrestricted, even though, as it turns out, those choices did have consequences for her.

In any event, the cases cited do not condition the validity of a condition precedent regarding marriage solely on the settlor's "dominant motive" in creating it. The provision that this court upheld in *Ransdell* gave the testator's son a life estate in certain property, but provided that title would be conveyed to him upon the death of his wife or their subsequent divorce. Although a conditional gift that has the tendency to induce divorce is generally considered void, this court noted that "certain facts and circumstances" in the particular case could save such a condition. Specifically, the testator's "purpose was simply to secure the gift to his son in the manner which, in his judgment, would render it of the greatest benefit to him in view of the relations then existing between him and his wife," including a separation of several years' duration and a pending divorce suit. *Ransdell,* 172 Ill. at 445, 50 N.E. 111. Thus, while *Ransdell* makes the testator's intent to provide a benefit to the donee a proper consideration, it does not elevate it to an absolute requirement. Hence, there is nothing illegitimate about a testator's preference for supporting a particular cause, value, or

personal interest over the interests of potential beneficiaries, so long as the condition stated in the will or trust does not, at the relevant time, violate public policy.

The result in *Gerbing* differed because the provision that tended to induce divorce, in violation of public policy, was not within the "exception to the general rule announced in *Ransdell.*" *Gerbing,* 61 Ill.2d at 508, 337 N.E.2d 29. That is, the couple was not already separated and a divorce suit was not pending. After noting that a condition that might tend to induce divorce is valid "if the dominant motive of the testator is to provide support in the event of such separation or divorce" (*Gerbing,* 61 Ill.2d at 507, 337 N.E.2d 29, citing Restatement of Property § 427 (1944)), this court concluded that the testator's intent was to "deprive her son of the ownership of this property as long as he remained married to his wife," not to provide for his support in the event of divorce. *Gerbing,* 61 Ill.2d at 508-09, 337 N.E.2d 29. Therefore, this court found the provision to be a "void condition precedent to the vesting of title to the property" in the son. *Gerbing,* 61 Ill.2d at 510, 337 N.E.2d 29.

Gerbing is readily distinguishable from the present case. The son in that case had a vested interest in the trust, from which he was receiving income for life. Title to the trust property was withheld from him, however, so long as he remained married to the wife of whom his late mother had disapproved. The provision had a tendency to exert "a disruptive influence upon an otherwise normally

harmonious marriage" and was, therefore, void as against public policy. *Gerbing,* 61 Ill.2d at 508, 337 N.E.2d 29. It could not be saved by reliance on the so-called *Ransdell* "exception."

Michele is mistaken when she asserts that a provision that tends to promote divorce or to restrain marriage is valid *only if* its dominant purpose is to benefit the potential donee. While such a dominant purpose may save such a provision, we have never stated that it is the only consideration. In any event, Michele had no interest in the trust whatsoever. Her taking title to trust property was not subject to a condition subsequent nor did she have an interest that would be divested by her marriage to a non-Jew. Her grandfather's purpose is, therefore, not implicated.

Second, Michele argues that the beneficiary restriction clause discourages lawful marriage and interferes with the fundamental right to marry, which is protected by the constitution. She also invokes the constitution in support of her assertion that issues of race, religion, and marriage have special status because of their constitutional dimensions, particularly in light of the constitutional values of personal autonomy and privacy.

Because a testator or the settlor of a trust is not a state actor, there are no constitutional dimensions to his choice of beneficiaries. Equal protection does not require that all children be treated equally; due process does not require notice of conditions

precedent to potential beneficiaries; and the free exercise clause does not require a grandparent to treat grandchildren who reject his religious beliefs and customs in the same manner as he treats those who conform to his traditions.

Thus, Michele's reliance on *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), is entirely misplaced. In *Shelley,* the Supreme Court held that the use of the state's judicial process to obtain enforcement of a racially restrictive covenant was state action, violating the equal protection clause of the fourteenth amendment. *Shelley,* 334 U.S. at 19, 68 S.Ct. at 845, 92 L.Ed. at 1183. This court, however, has been reluctant to base a finding of state action "on the mere fact that a state court is the forum for the dispute." *In re Adoption of K.L.P.,* 198 Ill.2d 448, 465, 261 Ill.Dec. 492, 763 N.E.2d 741 (2002) (citing cases). Indeed, *Shelley* has been widely criticized for a finding of state action that was not "'supported by any reasoning which would suggest that "state action" is a meaningful requirement rather than a nearly empty or at least extraordinarily malleable formality.'" *Adoption of K.L.P.,* 198 Ill.2d at 465, 261 Ill.Dec. 492, 763 N.E.2d 741, quoting L. Tribe, American Constitutional Law 1698 (2d ed.1988).

Third, Michele argues that the beneficiary restriction clause is capable of exerting an ongoing "disruptive influence" upon marriage and is, therefore, void. She is mistaken. The provision cannot "disrupt" an existing marriage because once the

beneficiary determination was made at the time of Erla's death, it created no incentive to divorce.

Finally, it has been suggested that Michael and Leila have litigated this matter rather than concede to Michele's demands because they wish to deprive the grandchildren of their inheritance. The grandchildren, however, are not the heirs at law of Max and Erla and had no expectancy of an inheritance, so long as their parents were living, even if Max and Erla had died intestate. In addition, Michael and Leila are the coexecutors of their parents' estates and, as such, are duty-bound to defend their parents' estate plans. *Hurd v. Reed,* 260 Ill. 154, 160, 102 N.E. 1048 (1913) ("It is the duty of an executor to defend the will"), citing *Pingree v. Jones,* 80 Ill. 177, 181 (1875) (executor is "bound, on every principle of honor, justice and right" to defend the will, he "owes this, at least, to the memory of the dead who placed this confidence in him"). Although those plans might be offensive to individual family members or to outside observers, Max and Erla were free to distribute their bounty as they saw fit and to favor grandchildren of whose life choices they approved over other grandchildren who made choices of which they disapproved, so long as they did not convey a vested interest that was subject to divestment by a condition subsequent that tended to unreasonably restrict marriage or encourage divorce.

CONCLUSION

It is impossible to determine whether Erla's distribution plan was the product of her own wisdom, good legal advice, or mere fortuity. In any case, her direction that $250,000 of the assets of Trust B be distributed upon her death to each of the then-living grandchildren of Max who were not "deemed deceased" under the beneficiary restriction clause of Max's trust revoked his plan for prospective application of the clause via a lifetime trust. Because no grandchild had a vested interest in the trust assets and because the distribution plan adopted by Erla has no prospective application, we hold that the beneficiary restriction clause does not violate public policy.

Therefore, we reverse the judgment of the appellate court and remand to the circuit court for further proceedings.

Reversed and remanded.

Chief Justice FITZGERALD and Justices FREEMAN, THOMAS, KILBRIDE, KARMEIER, and BURKE concurred in the judgment and opinion.

383 Ill.App.3d 992, 891 N.E.2d 549, 322 Ill.Dec. 534

Appellate Court of Illinois,
First District, Third Division.
In re ESTATE OF Max FEINBERG, Deceased
(Leila R. Taylor, as Independent Coexecutor of the Will of Max Feinberg, Deceased, Plaintiff-Appellant,
v.
Michael B. Feinberg, Individually and as Coexecutor of the Will of Max Feinberg, Deceased; Fifth Third Bank, as Trustee under the Trusts of Max Feinberg, Deceased; Michele Trull, neé Feinberg, Aron Feinberg, Lisa Taylor-Schroeder; Jon Taylor, Aimee Taylor-Severe; and The Unknown or Unborn Descendants of Leila R. Taylor, Michael B. Feinberg, Michele Trull neé Feinberg, Lisa Taylor-Schroeder, Jon Taylor, and Aimee Taylor-Severe; and The Known Descendants of Lisa Taylor-Schroeder, Jon Taylor, and Aimee Taylor-Severe, Defendants-Appellees).

Nos. 1-06-2823, 1-06-2824, 1-06-2843.

June 30, 2008.

Pedersen & Houpt, Chicago (Michael J. Durkin, of counsel), for Appellant.

Levin & Schreder (James R. Carey and Theodore E. Froum, of counsel), Christopher Langone, Chicago, Ethan E. Trull, Highland Park, for Appellees.

Justice CUNNINGHAM delivered the opinion of the court:

This is an interlocutory appeal from an order of the circuit court of Cook County striking down the testamentary provision that presents the following

question. Can an Illinois court enforce a testamentary provision that any of the testator's grandchildren who marry outside the Jewish faith, unless the spouse has converted or converts within one year of the marriage to the Jewish faith, will, for purposes of the testamentary instrument, be deemed to be deceased, along with all of his or her descendants? We find that such a provision is unenforceable because it is contrary to public policy. We therefore affirm the judgment of the circuit court of Cook County.

BACKGROUND

The caption of this litigation suggests that it involves several parties and different lawsuits and many issues. The narrow issue before this court is outlined above. Max and Erla Feinberg established trusts to distribute their considerable assets after their deaths. Max died on December 4, 1986, and Erla died on October 1, 2003. Max and Erla were survived by two children Michael and Leila. They were also survived by five grandchildren, Michele Trull, Aron Feinberg, Lisa Taylor-Schroeder, Jon Taylor, and Aimee Taylor-Severe. At the time of this lawsuit, all of the grandchildren had married, and only Jon was married to a person of the Jewish faith, by birth or conversion. Max's trust contained the following provision, which the parties refer to as the Jewish clause:

> "3.5(e) A descendant of mine other than a child of mine who marries outside the Jewish faith (unless the spouse of such descendant has converted or converts within one year of

> the marriage to the Jewish faith) and his or her descendants shall be deemed to be deceased for all purposes of this instrument as of the date of such marriage."

This appeal involves three cases arising out of the aforementioned trusts. The first case was the probate of Erla's estate. The second case, chronologically, was a case brought by the granddaughter of Max and Erla, Michele Trull, against the co-executors of Max and Erla's estates, Leila Taylor, Michael Feinberg, and Marshall Taylor (Leila's husband), alleging that those three defendants conspired to evade estate taxes and misappropriated millions of dollars from both Max's and Erla's estates. The third case involved Max's estate and was filed in 2005, when it was discovered that the co-executors were allegedly holding stock certificates registered to Max, nearly 20 years after his death, which they had failed to transfer to Max's estate.

Before these cases were consolidated, Leila Taylor, Marshall Taylor and Michael Feinberg, the defendants in Michele's lawsuit (the 2nd case) sought to have that lawsuit dismissed because it was brought by Michele and under the provision of the Jewish clause in Max's will, Michele was deemed to be deceased and therefore had no interest in the estate. Michele also filed a motion in the case involving Erla's estate (the 1st case), asking that the Jewish clause be invalidated and that the funds from Max's trust be distributed pursuant to Erla's power of appointment. Leila Taylor and Marshall Taylor filed a

petition in the case involving Max's estate (the 3rd case), again asserting that pursuant to the Jewish clause Michele is deemed to be deceased. These three cases were then consolidated in the circuit court and the trial judge held that the Jewish clause was invalid because it was against public policy. This appeal followed.

ANALYSIS

In this interlocutory appeal, we address only the purely legal question of the validity of the trust provision at issue and therefore we review the circuit court's determination *de novo*. *Steinbrecher v. Steinbrecher,* 197 Ill.2d 514, 523, 259 Ill.Dec. 729, 759 N.E.2d 509, 515 (2001). As early as 1898, our supreme court set forth the general rule that testamentary provisions which act as a restraint upon marriage or which encourage divorce are void as against public policy. *Ransdell v. Boston,* 172 Ill. 439, 445, 50 N.E. 111, 114 (1898). However, the court in *Ransdell* found that this rule was inapplicable to the facts before it because it was clear that the marriage at issue was already in disrepair, with the parties separated, at the time the provision was created. Nonetheless, subsequent Illinois courts have reaffirmed the underlying principle that testamentary provisions are invalid if they discourage marriage or encourage divorce. Thus, in *In re Estate of Gerbing,* 61 Ill.2d 503, 507-08, 337 N.E.2d 29, 32-33 (1975), the court invalidated a will provision providing, *inter alia,* that a trust would terminate and the corpus would go to the testator's son

if the son obtained a divorce. The clause in question stated:

> "'In the event my said son's wife, ARLIE GERBING predeceases my son, FRANK GERBING, JR., or in the event ARLIE GERBING and FRANK GERBING, JR. are divorced and remain divorced for a period of two (2) years, then in either event this trust shall terminate and my trustee is directed to pay, turn over and deliver the remaining principal of the trust property and all accrued dividends or interest accumulated thereon to my said son. In the event my son, FRANK GERBING, JR., predeceases his wife, ARLIE GERBING, then I direct my trustee to deliver the remaining principal of the trust property together with all accrued or undistributed net income therefrom to my sister, KATHERINE SIEBOLD GRIGG, if she survives my said son. If my said sister predeceases my son, FRANK GERBING, JR., then upon the death of my said son, I direct my trustee to deliver the remaining principal of the trust property and all accrued or undistributed net income therefrom to ROBERT GRIGG, if living, or if ROBERT GRIGG is not living at that time, to his children living at the date of the death of FRANK GERBING, JR., share and share alike.'" *Gerbing*, 61 Ill.2d at 505, 337 N.E.2d at 31.

In *Winterland v. Winterland*, 389 Ill. 384, 386-87, 59 N.E.2d 661, 662 (1945), the court invalidated a

will provision which, *inter alia,* left a life estate to the testator's wife with the remainder to all of his children except that the share of one son, George, would be held in trust for him and the corpus given to him only upon his divorce or the death of his wife. The clause in question in that case stated:

> "'I now modify the Third Clause of said Original Will and direct and will that the equal share therein contemplated to be given to my son, George Winterland, if he should survive me, is given, devised and bequeathed to my son Henry Winterland, but in trust nevertheless that he shall keep said share safely invested and pay the income therefrom in cash into the hands of my said son George, so long as he may live or until his present wife shall have died or been separated from him by absolute divorce. If either of those events shall occur during the life of my said son, George, then the principal of said share shall be paid to him, my said son George, as his absolute and unlimited estate. If, however, my said son George shall die prior to my death or having survived me shall die prior to the occurring of either of the two possible events aforesaid, then the principal of his said share shall be divided and is given by me equally between my children then surviving, or if any of such children shall have died leaving children him or her surviving, then such children shall take the share the parent would have taken, if living.'" *Winterland,* 389 Ill. at 385, 59 N.E.2d at 662.

The language and circumstances of the aforementioned clauses, which Illinois courts have found to be against public policy, are strikingly similar to the instant case. We see no reason to depart from this well-established principle.

However, some other states do not follow the uniform precedent of Illinois in validating such provisions. *Shapira v. Union National Bank,* 39 Ohio Misc. 28, 29-39, 315 N.E.2d 825, 827-32 (1974) (upholding provision requiring decedent's son to marry, within seven years of testator's death, a Jewish girl born of two Jewish parents); *In re Silverstein's Will,* 155 N.Y.S.2d 598, 599-600 (Sur.Ct.1956) (upholding requirement of marriage to person of the Jewish faith); *Gordon v. Gordon,* 332 Mass. 197, 203-08, 124 N.E.2d 228, 231-33 (1955) (upholding provision revoking gifts to beneficiaries who married persons not born in the Jewish faith). *Contra In re Keffalas' Estate,* 426 Pa. 432, 435, 233 A.2d 248, 250 (1967) (struck down as encouraging divorce and against public policy a provision that testator's three eldest sons must divorce any wives of a different faith and marry Greek Orthodox women in order to inherit). For an excellent discussion of this area of the law, see J. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices,* 1999 U. Ill. L.Rev. 1273, 1329 (arguing that no restraints on the personal behavior of a legatee should be enforced). For another general discussion, see Annotation, *Validity of Provisions of Will or Deed*

Prohibiting, Penalizing, or Requiring Marriage to One of a Particular Religious Faith, 50 A.L.R.2d 740 (1956).

The Restatement Third of Trusts provides that trust provisions which are contrary to public policy are void. It gives as a specific example a provision that all of a beneficiary's rights to a trust would terminate if he married a person who was not of a specified religion:

> "*j. Family relationships.* A trust or a condition or other provision in the terms of a trust is ordinarily * * * invalid if it tends to encourage disruption of a family relationship or to discourage formation or resumption of such a relationship. * * *
>
> * * *
>
> In addition, a trust provision is ordinarily invalid if it tends seriously to interfere with or inhibit the exercise of a beneficiary's freedom to obtain a divorce * * * or the exercise of freedom to marry * * * by limiting the beneficiary's selection of a spouse * * * . * * *
>
> * * *
>
> 3. The marriage condition terminates all of [settler's nephew] N's rights if, before termination of the trust, he 'should marry a person who is not of R Religion,' with the same gift over to C College. The condition is an invalid restraint on marriage; the trust and N's rights will be given effect as if the marriage condition and the gift over to C College had been omitted from the terms of

the trust." Restatement of Trusts § 29, Explanatory Notes, Comment *j*, Illustration 3, at 62-64 (3d ed.2003).

We hold that under Illinois law and under the Restatement (Third) of Trusts, the provision in the case before us is invalid because it seriously interferes with and limits the right of individuals to marry a person of their own choosing. We are not persuaded by the contention that this is a new rule which should only be applied prospectively. As we have noted, similar holdings in which Illinois courts have found similar provisions to be against public policy date back to 1898. Nor are we persuaded by the defendants' argument that the trust provision was to be applied at the time of Erla's death and therefore did not affect future behavior. The provision's clear intent was to influence the marriage decisions of Max's grandchildren based on a religious criterion and thus to discourage marriage by the grandchildren other than to those of the Jewish faith. This provision violated public policy, as the circuit court correctly held. As there is clearly a nonconstitutional basis on which to resolve this issue, we need not determine whether the provision is also a violation of the state and federal constitutions. *People v. Brown*, 225 Ill.2d 188, 200, 310 Ill.Dec. 561, 866 N.E.2d 1163, 1170 (2007).

We affirm the order of the circuit court of Cook County and remand for further proceedings.

Affirmed and remanded.

Presiding Justice QUINN, specially concurring:

I completely concur with Justice Cunningham's majority opinion. I write separately to express the bases of my disagreement with Justice Greiman's dissent. The dissent asserts that "Max and Erla had a dream," and that they "seek to preserve their 4,000-year-old heritage by providing that upon their death, a grandchild who married outside of the Jewish faith shall be deemed to have predeceased the testators." Op. 383 Ill.App.3d at 1000, 322 Ill.Dec. at 540, 891 N.E.2d at 555 (Greiman, J., dissenting). Unfortunately, this noble defense of "the Jewish Clause" is refuted by the appellants themselves. As the appellants point out in their reply brief, "If Max were truly trying to prevent marriages outside the Jewish faith, Michael asserts he would have included his children [the appellants] as being subject to the Jewish Clause." Further, "if a Feinberg grandchild were to convert to Catholicism there is no restriction on that grandchild receiving his or her distribution under the Max Trust B."

The purpose of the instant suit is succinctly stated in the appellants' opening brief:

> "The plain meaning of the Jewish Clause indicates that for purposes of the administration and distribution of Max's Trust, each of Aron, Aimee, Lisa and Michele and their respective descendants should be treated as deceased and therefore not eligible to receive any benefit from Max's Trust. Pursuant to Erla's Power of Appointment, the specific bequests of $250,000 due to Aron and Michele would be distributed to their father, Michael and the similar bequests due Aimee and Lisa would be distributed to their mother, Leila."

Simply put, Leila and Michael wish to deprive their own children of their inheritance. In support of this position, the appellants point out, "The forfeiture to the parent will allow the beneficiary to potentially inherit the funds from his or her parent." If Michael and Leila's actions in instituting this suit and prosecuting this appeal is any indication of their future intentions toward their children, this potential inheritance does not rise to the level of even a forlorn hope.

The first thing any reader of the majority opinion and the dissent should note is the age of the cases cited. The majority cites one case less than 50 years old, *In re Estate of Gerbing,* 61 Ill.2d 503, 337 N.E.2d 29 (1975). The dissent cites two: *In re Estate of Laning,* 462 Pa. 157, 164, 339 A.2d 520, 523 (1975), and *Shapira v. Union National Bank,* 39 Ohio Misc. 28, 33, 315 N.E.2d 825, 829 (1974). The *Laning* court relied on the Restatement (Second) of Trusts § 62(f), (g) (1959). The *Shapira* court similarly cited the Restatement (Second) of Trusts § 62(h) (1959). Two cases

cited by the dissent relied on the Restatement (First) of Trusts: *United States Bank of Portland v. Snodgrass,* 202 Or. 530, 537, 275 P.2d 860, 868 (1954), which cited section 62(g) and *Gordon v. Gordon,* 332 Mass. 197, 206, 124 N.E.2d 228, 234 (1955), which cited Annotation, *Conditions, Conditional Limitations or Contracts in Restraint of Marriage,* 122 A.L.R. 7 (1939).

In the instant case, the circuit court relied on the language of the Restatement (Third) of Trusts § 29, Comment;, Illustration 3, at 64 (2003), as found in the majority opinion. The Restatement (Third) of Trusts has previously been cited as persuasive authority by this court in *Peck v. Froehlich,* 367 Ill.App.3d 225, 229, 304 Ill.Dec. 850, 853 N.E.2d 927 (2006), citing Restatement (Third) of Trusts § 50, Comment E(4), at 273-74 (2003).

While the dissent frames the issue as being whether Max and Erla could make testamentary dispositions "to preserve their 4,000-year-old heritage," the position it espouses could just as well result in the courts being required to enforce the worst bigotry imaginable. As the dissent points out, the court in *In re Liberman,* 279 N.Y. 458, 18 N.E.2d 658 (1939), cited as persuasive authority cases which upheld conditions not to marry " Papists" or Scots. Logically, the dissent would uphold the "Jewish Clause" in the instant case if it had provided that any of Max and Erla's grandchildren would lose their bequests if they had married someone who was Jewish or black or a member of any other group Max did not like. I agree

with the dissent that the majority of jurisdictions which have addressed this issue have come down on the side of upholding testamentary conditions which are referred to benignly as "partial restraints." However, the vast majority of these cases were decided more than 50 years ago and none of them considered the Restatement (Third) of Trusts.

In *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), the Supreme Court relied on the fourteenth amendment in striking down privately executed restrictive covenants prohibiting real property from being used or occupied by any persons except those of the Caucasian race. In doing so, Chief Justice Vinson noted, "These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements." *Shelley v. Kraemer,* 334 U.S. at 13, 68 S.Ct. at 842, 92 L.Ed. at 1180-81. I am aware that the *Shapira* court rejected the applicability of *Shelley* to cases such as the instant one, holding:

> "In the case at bar, this court is not being asked to enforce any restriction upon Daniel Jacob Shapira's constitutional right to marry. Rather, this court is being asked to enforce the testator's restriction upon his son's inheritance." *Shapira v. Union National Bank,* 39 Ohio Misc. at 31, 315 N.E.2d at 827.

However, I believe that this rationale may be a distinction without a difference.

I am also aware that the restrictive covenants considered in *Shelley* ostensibly were to be enforced in perpetuity and that under the Rule Against Perpetuities, a noncharitable trust generally can last for no more than three generations, so a testator's imposition of limitations can usually only be enforced for 75 years. J. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. Ill. L.Rev. 1273, 1280. However, I believe that requiring courts to enforce such restraints even for only 75 years is too much. One of the decisions relied upon by the dissent illustrates the difficulties which face courts in attempting to enforce certain "partial restraints." In *In re Kempf's Will*, 252 A.D. 28, 297 N.Y.S. 307 (1937) the court interpreted the following testamentary condition:

> "The bequest of a legacy on condition that the beneficiary 'shall brought up and educated in the faith of and according to the Roman Catholic Religion, otherwise this paragraph of this, my last will and testament, shall cease and be void and of no effect.'"

The court held that the beneficiary failed to comply with this condition even though he had been baptized as a Catholic, attended Catholic Sunday school and attended mass at various Roman Catholic churches with "reasonable regularity" for years. The beneficiary had missed attending his first communion due to illness and never received communion. The court found that this failure violated the testamentary

condition and, therefore, the bequest to the beneficiary was denied.

In the instant case, the appellees question what would occur if one of the grandchildren initially married a non-Jew but subsequently married a Jew. Under the "Jewish Clause" the grandchild would be deemed to be deceased as of the date of the first marriage. The question arises as to whether the grandchild would be "resurrected" upon marrying the Jewish spouse. While the question is only theoretical, it is a very likely scenario. I believe that courts are ill-suited to decide this issue or the issue presented in *Kempf*.

As quoted in the dissent, "'It is generally held in this country that partial restraints on marriage are valid unless unreasonable * * * .' *Gordon v. Gordon,* 332 Mass. at 206, 124 N.E.2d at 234." Op. 383 Ill.App.3d at 1001, 322 Ill.Dec. at 540, 891 N.E.2d at 555. While the Restatement (First) and (Second) of Trusts explained that restraints such as the instant "Jewish Clause" were once considered reasonable, the Restatement (Third) of Trusts now provides that they are no longer reasonable. While many jurists, notably the Justices of the United States Supreme Court who adhere to the principle of following the "original intent" of the framers of the constitution believe in a static jurisprudence, the authors of the Restatements do not. I believe the Restatement (Third) of Trusts § 29 (2003) is correct and I concur in affirming the circuit court's well-reasoned decision.

Justice GREIMAN, dissenting:

Max and Erla Feinberg seek to preserve their 4,000-year-old heritage by providing that upon their death, a grandchild who married outside the Jewish faith shall be deemed to have predeceased the testators, but if they have complied with the restrictions, are to immediately receive their legacy.

The majority opinion cites three Illinois cases which are wholly inapposite to the case at bar. In these three cases, *Ransdell v. Boston,* 172 Ill. 439, 50 N.E. 111 (1898), *In re Estate of Gerbing,* 61 Ill.2d 503, 337 N.E.2d 29 (1975), and *Winterland v. Winterland,* 389 Ill. 384, 59 N.E.2d 661 (1945), the testators provided that their descendants would not get the principal of the estate if they remained married to their then current spouses. Clearly this was an effort to direct the legatee-descendants to obtain a divorce. The Illinois courts held such a provision to be against the public policy of our state.

Unlike the several cases that the majority opinion cites relating to divorce, the trustees here are not required to hold the property during the lifetime of descendants after the death of the testators.

The majority opinion in a single paragraph acknowledges that there is precedent to the contrary in other states. Examination of cases from other jurisdictions, however, indicates that we would be in the minority if we failed to uphold Max and Erla's limitation.

In *Gordon v. Gordon,* 332 Mass. 197, 124 N.E.2d 228 (1955), the Supreme Court of Massachusetts upheld a provision revoking gifts to beneficiaries who married persons not born in the Jewish faith. The court observed: "It is generally held in this country that partial restraints on marriage are valid unless unreasonable. [Citations.] Thus, testamentary gifts conditioned on the beneficiary not marrying a specified individual have been upheld." *Gordon,* 332 Mass. at 206, 124 N.E.2d at 234, citing *Turner v. Evans,* 134 Md. 238, 106 A. 617 (1919); *Graydon's Executors v. Graydon,* 23 N.J.Eq. 229, 1872 WL 121 (1872); *In re Proving the Will of Seaman,* 218 N.Y. 77, 112 N.E. 576 (1916); *Osborne's Petition,* 21 Pa. D. & C. District 293, 1934 WL 3986 (1934); *Pacholder v. Rosenheim,* 129 Md. 455, 99 A. 672 (1916) (holding that "a requirement * * * not marrying outside the Jewish faith was also good").

In re Liberman, 279 N.Y. 458, 464, 18 N.E.2d 658, 660 (1939), the New York appellate court observed "[c]onditions not to marry a Papist * * * or a Scotchman or not to marry any but a Jew have also been held good." Although the *Liberman* case invalidated a provision requiring the beneficiary to marry only with the consent of his mother, brother or sister, the court did so not because the provision was intended to restrain the beneficiary from marrying anyone other than a Jewess but, rather, because it found the consent feature invalid.

Similarly, in *In re Weil's Estate,* 124 Misc. 692, 209 N.Y.S. 779 (1925), *In re Salomon's Estate,* 156

Misc. 445, 281 N.Y.S. 827 (1935), and *In re Rosenthal's Estate,* 204 Misc. 432, 123 N.Y.S.2d 326 (1953), the respective courts found that similar provisions of forfeiture were valid. In upholding a provision in the testator's will prohibiting beneficiaries from inheriting should they "marry a person of a different religious faith from mine," the *Weil* court stated, "It is well settled that a condition in general restraint of marriage is void and inoperative as against public policy. [Citation.] On the other hand, however, a clause in special restraint of marriage, such as prohibition of marriage to a person outside of a particular faith or to a designated person, is in the ordinary course valid." *In re Weil's Estate,* 124 Misc. at 695, 209 N.Y.S. at 781.

The issue in the case at bar is not necessarily a Jewish issue. A similar rule obtained in *United States Bank of Portland v. Snodgrass,* 202 Or. 530, 275 P.2d 860 (1954), where the Oregon Supreme Court upheld a limitation that the legatee had "not embraced, nor become a member of, the Catholic faith" (*Snodgrass,* 202 Or. at 534, 275 P.2d at 862) and stated that it agreed with the conclusion set forth in American Law Reports that the "'weight of authority, however, is to the effect that a testator has the right to make the enjoyment of his bounty dependent on the condition that the recipient renounce, embrace, or adhere to a particular religious faith'" (*Snodgrass,* 202 Or. at 534, 275 P.2d at 868, quoting A.S.M., *Wills: Condition that Devisee or Legatee Shall Renounce, Embrace, or Adhere to Specified Religious Faith,* 25 A.L.R. 1523, 1524 (1923)). In support thereof, the *Snodgrass* court

cited *Barnum v. Mayor & City Council, City of Baltimore,* 62 Md. 275, 1884 WL 3614 (1884), *Mitchell's Lessee v. Mitchell,* 18 Md. 405 (1862), *In re Paulson's Will,* 127 Wis. 612, 107 N.W. 484 (1906), as well as a number of English cases.

Gifts which are conditioned upon children being brought up and educated in the faith of and according to the Roman Catholic religion have been held as valid. In *In re Kempf's Will,* 297 N.Y.S. 307, 312, 252 A.D. 28, 32 (1937), the New York Supreme Court, after observing the federal constitution's first amendment, stated:

> "These constitutional guarantees of religious freedom are limitations upon the power of government, not upon the right of an individual to make such testamentary disposition of his property as he may desire provided always that positive law or public policy is not contravened. We find nothing in the condition here in question which deprives the petitioner of freedom of conscience as to his religion; nor is it against public policy. * * * Having chosen to make the petitioner an object of his bounty, the testator had the right to burden his gift with conditions."

A similar provision was upheld by the Delaware Court of Chancery in *Delaware Trust Co. v. Fitzmaurice,* 27 Del.Ch. 101, 31 A.2d 383 (1943), while the Supreme Court of Pennsylvania, in *In re Estate of Laning,* 462 Pa. 157, 160, 339 A.2d 520, 521 (1975),

enforced a testamentary condition that required that the testator's grandchildren be "members in good standing of the Presbyterian church."

The concurring opinion mentions the reference to the Restatement (Third) of Trusts in the majority opinion and then cites *Peck v. Froehlich,* 367 Ill.App.3d 225, 304 Ill.Dec. 850, 853 N.E.2d 927 (2006), which has absolutely nothing to do with the case at bar.

Of particular interest is that the author of the concurring opinion has not mentioned other subject matter annotations that are precisely contrary to his citation. For example, in American Law Reports (89 A.L.R.3d 984 (1979)), a section entitled *Wills: Condition that Devisee or Legatee Shall Renounce, Embrace, or Adhere to Specified Religious Faith,* goes so far as to outline the material that testamentary draftsmen may safely advise their clients with respect to such provisions. Specifically, section 2b provides: "Modern authority upholds testamentary conditions that a donee embrace or renounce a particular faith, so that in most jurisdictions testamentary draftsmen may safely advise their clients that within limits, such a provision may be included in a will." J. Ludington, 89 A.L.R.3d § 2b at 986 (1979). Similarly, in Illinois Practice (19 R. Hunter, Illinois Practice § 188:11 at 176 (5th ed.2008)), dealing with conditions and restrictions relating to religion, it is stated:

> "It is generally held that provisions in a will requiring a beneficiary to renounce, embrace

> or adhere to a particular religious faith are valid as against the contention that they are contrary to public policy generally or to the specific policy embraced in constitutional guarantees of religious freedom. Similarly, testamentary conditions restricting the beneficiary's marriage to a person of a specified faith or requiring the marriage to be performed according to a particular religious form, or that children of the marriage be educated in such faith or form, are generally upheld."

The concurring opinion reaches out to *Shelley v. Kraemer,* where the United States Supreme Court held that restrictive covenants prohibiting real property from being used or occupied by any persons except those of the Caucasian race were invalid. In *Shelley* the covenants were placed upon the real estate by grantors that had no relationship whatsoever with subsequent grantees or grantors. The covenants could affect the transfer of real property from grantors to grantees, neither of which had any relationship with the original creator of the restriction, and would continue for decades, generations and perhaps forever. In the case at bar, we have a man and woman placing restrictions on a gift to their grandchildren and those gifts do not touch upon strangers in the distant future.

Moreover, in *Shelley,* the court understood its limitations and provided that its holding would only provide authority for enforcement by state courts allowing them to refuse to enforce restrictive covenants

that violate the equal protection clause of the fourteenth amendment, stating: "That Amendment [fourteenth] erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley,* 334 U.S. at 13, 68 S.Ct. at 842, 92 L.Ed. at 1180.

The concurring opinion further suggests there are difficulties which face courts in attempting to enforce certain partial restraints. Indeed there are. For example, in matters where there is a question as to whether the beneficiary has "been brought up and educated in the Roman Catholic religion or whether he attended Catholic Sunday school and attended mass at various Roman Catholic churches with 'reasonable regularity' for years," the court would be required to inquire as to whether the legatee heir performed various religious rites. However, that is not the case here where there is no suggestion that the spouses of the grandchildren are Jewish. In *Shapira v. Union National Bank,* 39 Ohio Misc. 28, 315 N.E.2d 825 (1974), the Ohio court upheld the provision requiring the son to marry a Jewish girl within seven years of his death and in the event he was unmarried within the seven years to a Jewish girl or married to a non-Jewish girl, the son's share of the estate was to go to the State of Israel.

The *Shapira* court concluded:

> "[it] demonstrates the depth of the testator's conviction. His purpose was not merely a negative one designed to punish his son for

> not carrying out his wishes. His unmistakable testamentary plan was that his possessions be used to encourage the preservation of the Jewish faith and blood, hopefully through his sons, but, if not, then through the State of Israel. Whether this judgment was wise is not for this court to determine. But it is the duty of the court to honor the testator's intention within the limitations of law and of public policy. The prerogative granted to a testator by the law of this state to dispose of his estate according to his conscience is entitled to as much judicial protection and enforcement as the prerogative of a beneficiary to receive an inheritance." *Shapira*, 39 Ohio Misc. at 38-39, 315 N.E.2d at 832.

Accordingly, the great weight of authority as to cases which have considered this subject have held such provisions as it appears in the case at bar to be reasonable and not contrary to the state's public policy. The majority places us in the minority of jurisdictions that have considered this issue.

Max and Erla had a dream with respect to the provisions of their will and if you will it, it is no dream.

ORDER

This matter comes before the court pursuant to an Amended Complaint for Construction of the "Jewish Clause" and Declaratory Relief filed by Leila R. Taylor, an independent co-executor of the decedent's (Max Feinberg) estate. The co-executor seeks construction of a specific provision contained in the decedent's trust (the Max Feinberg Trust) that the parties refer to as the "Jewish Clause". That provision reads as follows:

"3.5(e) A descendant of mine other than a child of mine who marries outside the Jewish faith (unless the spouse of such descendant has converted or converts within one year of the marriage to the Jewish faith) and his or her descendants shall be deemed to be deceased for all purposes of this instrument as of the date of such marriage."

The executor asserts that the clause is valid and binding under Illinois law. The executor requests that this Court deem certain beneficiaries as deceased for all purposes under the Max Feinberg Trust pursuant to the decedent's intent as expressed in the above provision.

In response, one of the beneficiaries, Michele Trull *nee* Feinberg, (hereafter MICHELLE [sic]) contends that the provision at issue is void as a matter of law for a number of reasons:

1. because enforcement would violate the Constitution;
2. conditions on testamentary gifts that discourage lawful marriage are contrary to public policy;
3. it's unenforceable because it seeks to control beneficiaries long after death;
4. it's too vague and indefinite to be enforced; and
5. it offers a financial inducement to embrace a certain religion.

This Court finds MICHELLE's [sic] public policy argument to be most compelling. The Illinois Supreme Court has articulated a general rule that conditions on bequests that tend to discourage lawful marriage are against public policy. That rule is found in the case of *In re Estate of Gerbing*, 61 Ill. 2d 503, 507 (Ill. 1975):

"In Illinois public policy as revealed by the decisions of this court holds that a condition annexed to a devise or bequest, the tendency of which is to encourage divorce or bring about a separation of husband and wife is against public policy, and the condition is void. (Winterland v. Winterland, 389 Ill. 384, 386; Tripp v. Payne 339 Ill. 178, 183; Ransdell v. Boston, 172 Ill. 439, 445; see also Restatement of Property sec. 427 (1944); Annot., 14 A.L.R.3d 1219 (1967).) Of course, if the dominant motive of the testator is to provide support in the event of such separation or divorce the condition is valid (Restatement of Property sec. 427 (1944).)"

In the instant case, the provision at issue constitutes a partial restraint on marriage in that it would tend to discourage a beneficiary from marrying the person of their choosing should that person not be of the Jewish faith. The subject provision is clearly not one which meets the criteria of the exception to the general rule, that is this "Jewish Clause" is not one which was meant to provide support in the event of a divorce or separation. This clause was intended by the decedent, as was asserted by the co-executor, as a "way of promoting through his own family the preservation of the Jewish culture and faith that he both treasured and feared was at risk."

This court has found no specific case in Illinois that says that such a partial restraint on marriage as contained in the subject provision is against public policy. MICHELLE [sic] argues that this court should follow Section 29 of the Restatement (Third) of Trusts, 2003 and find that the "Jewish Clause" constitutes an invalid partial restraint on marriage and is therefore invalid as against public policy.

This Court has reviewed and taken into consideration the discussion of this issue as contained in the Restatement, Sec. 29, Purposes and Provisions That Are Unlawful or Against Public Policy. That section deals specifically with invalid trust provisions and provides as follows:

"An intended trust or trust provision is invalid if:

(a) its purpose is unlawful or its performance calls for the commission of a criminal or tortious act;

(b) it violates rules relating to perpetuities; or

(c) it is contrary to public policy."

In the attendant comments and illustrations, it is clear that the authors of the Restatement (Third) consider the exact factual situation described in the "Jewish Clause" to be an invalid restraint on marriage:

"*j. Family relationships.* A trust or a condition or other provision in the terms of a trust is ordinarily (see below) invalid if it tends to encourage disruption of a family relationship or to discourage formation or resumption of such a relationship.

. . . In addition, a trust provision is ordinarily invalid if it tends seriously to interfere with or inhibit the exercise of a beneficiary's freedom to . . . marry, . . . by limiting the beneficiary's selection of a spouse. . . .

(Illustrations) . . . 2. A transfers property to T Trust Co. in trust for her nephew, N. N is to receive discretionary payments until age 18, after which he is to receive all the current net income periodically and discretionary principal payments until age 30, when he is to receive outright distribution of all of the trust property. The trust contains a provision directing

that, in the event "N should be so foolish as to marry before age 20, all of his rights and interests in the trust shall terminate, and the entire trust estate at the time of his remarriage shall be distributed to C College." The condition attached to N's beneficial interests is valid (and will be enforced absent extenuating circumstances); it merely relates to the time of marriage, and the brief age restriction involved does not unreasonably restrain his freedom to marry.

3. The same facts as in Illustration 2, except that the marriage condition terminates all of N's rights if, before termination of the trust, he **"should marry a person who is not of R Religion,"** with the same gift over to C College. **The condition is an invalid restraint on marriage**; the trust and N's rights will be given effect as if the marriage condition and the gift over to C College had been omitted from the terms of the trust." . . . (Emphasis added)

The co-executor has argued that the Restatement (Third) of Trusts has not been cited authoritatively or adopted by any Illinois reviewing court and therefore this court should not rely on it in its decision making process. However, the Appellate Court, Second District, in the very recent case of *Handelsman v. Handelsman,* 2-05-0790 (July 7, 2006) relied upon the Restatement (Third) as authority for its opinion in that case and adopted a principle contained in Sec. 25 of the Restatement that dealt with the construing of trusts that are will substitutes. Likewise, this court accepts the guidance offered by the Restatement with regards to the issue before it. And, in conjunction

with the general rule regarding conditions on bequests as articulated by the Illinois Supreme Court, this court believes there is a sufficient basis in law for its finding that the "Jewish Clause" is an invalid restraint on marriage and is contrary to public policy.

Because this Court finds that the Jewish Clause constitutes an invalid partial restraint on marriage and is therefore invalid as against public policy, this Court need not address any additional objections raised by MICHELLE [sic].

The relief requested by co-executor Leigh Taylor is denied.

_____
Hon. Susan M. Coleman

_____
Date

ENTERED
JUDGE SUSAN M. COLEMAN-1747

AUG 23 2006

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November 23, 2009

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No. 106982 – In re Estate of Max Feinberg, Deceased (Leila R. Taylor, etc., et al., appellees, v. Michael B. Feinberg, Indv., etc., appellant). Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 28, 2009.

Supreme Court, U.S.
FILED
APR 26 2010
OFFICE OF THE CLERK

No. 09-1011

In The

Supreme Court of the United States

MICHELE FEINBERG TRULL,

Petitioner,

vs.

MICHAEL B. FEINBERG,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does a state court order confirming the validity of a testamentary appointment of trust principal violate the Equal Protection or Establishment Clauses of the Constitution of the United States when that appointment excludes potential beneficiaries who had or were married outside a specific religious faith as of the date of the appointor's death?

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STATEMENT OF THE CASE

Petitioner substantially misrepresents Max Feinberg's viewpoints and intentions, the practical operation of the Religious Preference Clause (called the "beneficiary restriction clause" by the Illinois Supreme Court), the procedural history and the opinion of the Illinois Supreme Court.

A. Max Feinberg's Intent

Max Feinberg ("Max"), a man of conservative religious leanings, intended the Religious Preference Clause to "promot[e] through his own family the preservation of the Jewish culture and faith that he both treasured and feared was at risk." (App. 16, 65).[1] Traditional Jewish religious law prohibits intermarriage and treats it as an abandonment of the faith. 2 J. David Bleich, *The Prohibition against Intermarriage*, *in* CONTEMPORARY HALAKHIC PROBLEMS 268 (Ktav Publishing House 1983) (discussing Scriptural sources of prohibition). During his life, Max observed statistics showing that over fifty *per cent* of American Jews married members of other faiths and expressed concern regarding the threat such intermarriage posed to the Jewish faith. (App. 16). Accordingly, Max employed the Religious Preference Clause

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[1] References are as follows: Petition, "(Pet., p. ___)"; Appendix to Petition, "(App. ___)."; Petitioner's Brief before the Illinois Supreme Court, "(Pet'r's Ill. Sup Ct Br., p ___)"; the Record on Appeal, "(C___)."

to provide a benefit to those descendants of his children who opted to honor and further his commitment to the Jewish faith by marrying within that faith or by remaining unmarried and, thereby, remaining Jewish under traditional Jewish religious law. There is nothing whatsoever in the record to support Petitioner's wild accusation that "the Religious Preference Clause at issue here is rooted in religious bigotry" nor is there any evidence regarding Max's views on gentiles or religions other than Judaism. (Pet., p. 18).

B. The Operation of Max Feinberg's Trust

Max's trust instrument directed the trustee to divide the trust property between two further trusts on Max's death and granted Max's widow, Erla Feinberg ("Erla"), the net income and a limited right of withdrawal of principal from both resulting trusts. (App. 2). Importantly, Max also gave Erla a testamentary power of appointment over the principal of both resulting trusts, exercisable in favor of Max's descendants. (*Id.* at 3). Max's trust instrument further provided that, upon Erla's death, the balance of the resulting trusts would be distributed to Max's children and grandchildren, subject to the Religious Preference Clause, each share to be held in a separate trust for the benefit of the descendant during his or her lifetime. (*Id.*)

Max Feinberg died in 1986. (*Id.* at 2). His will named his children, Michael Feinberg (the Respondent)

and Leila Taylor ("Leila"), as co-executors of his estate and provided that the residue of his estate be distributed to his trust. (*Id.*) He was survived by Erla, two children and five grandchildren, including Petitioner. (*Id.*)

Erla did, in fact, exercise her power of appointment by directing that, on her death, the trustee would make a gift of $250,000 from the resulting trusts' principal to each of the children and grandchildren who were not "deemed deceased." (App. 4). Under the terms of the bequest, if any grandchild was deemed deceased at the time of Erla's death, his or her gift would instead be paid to the parents of that grandchild. (*Id.*) These bequests were sufficient, at the time of Erla's death, to completely deplete the assets of the trusts, net estate taxes. (*Id.*)

Contrary to Petitioner's unfounded assertions, nothing in the terms of Max's trust instrument or Erla's appointment required court involvement or approval and both were fully capable of private administration by the relevant trustees in accordance with their terms. (Pet., p. 3).

It is undisputed that only one of Max and Erla's five grandchildren married within the Jewish faith. (App. 4-5). Petitioner concedes she did not marry within the Jewish faith. (Pet., p. 3).

C. The Procedural History

Erla Feinberg died in 2003. (App. 5). In June 2004, Petitioner filed suit against her aunt, asserting, among other things, that Leila had tortiously interfered with Petitioner's expectancy; Petitioner later added her father, Respondent, as an additional defendant. (C0003). Erla's will was admitted to probate in July 2004, and Max's will was admitted in September of that same year.[2] (C0085, 0197). The cases were consolidated in October 2005. (C1021).

In March 2006, Leila filed an "Amended Petition For Construction of the 'Jewish Clause,'" which sought a declaratory judgement as to the clause's enforceability, specifically as applied to Petitioner. (C1834-65). In August 2006, the probate court entered an order holding that the Religious Preference Clause was contrary to public policy. (App. 63-68). Respondent and Leila, individually and as co-executors of Max's estate, filed timely, interlocutory notices of appeal to the Appellate Court of Illinois. In June 2008, the appellate court, in a 2-1 decision, affirmed the trial court. (*Id.* at 40-62).

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[2] Max's will was admitted to probate eighteen years after his death because assets were found in his name that needed to be added to the resulting trusts, not because any party sought or required interpretation or enforcement of the trusts' terms

D. The Illinois Supreme Court's Opinion

The Illinois Supreme Court reversed in a unanimous decision. The court held that Erla's exercise of her power of appointment fundamentally altered the operation of the Religious Preference Clause from both a factual and legal perspective. Had Max survived Erla, his trust would have, upon his death, created funded trusts for those grandchildren who had not married outside the Jewish faith. (App. 3). A grandchild could, arguably, lose his or her rights to a funded trust if he or she subsequently married outside the faith. Max's trust, therefore, could have created a condition subsequent on his grandchildren's inheritances and this condition could, arguably, have influenced their behavior after his death.

Erla's appointment, on the other hand, made outright, one-time gifts – in amounts sufficient to deplete the trust – to those grandchildren who had not married outside the Jewish faith prior to Erla's death. (*Id.* at 31-32). Erla's appointment, therefore, created a condition precedent on the grandchildrens' inheritances; the only relevant factual determination regarding the Clause's application was the grandchildren's marital status at the time of Erla's death. (*Id.*) The Clause, as modified by Erla's appointment, was not, therefore, directed to any future conduct and could not have influenced the grandchildren's behavior after her death. (*Id.*) The use of such conditions precedent is the legal and functional equivalent of simply excluding certain potential beneficiaries by name which, all parties concede, is legally permissible

regardless of the testator's underlying reasons or motivations. (*Id.* at 6, 29). Recognizing this, the Illinois Supreme Court held that, under Illinois common law, testators are free to distribute their estate as they "see fit and to favor grandchildren of whose life choices they approved over other grandchildren who made choices of which they disapproved, so long as they did not convey a vested interest that was subject to divestment by a condition subsequent that tended to unreasonably restrict marriage or encourage divorce." (*Id.* at 38).

The Illinois Supreme Court did address Petitioner's constitutional arguments, holding that "[b]ecause a testator or the settlor of a trust is not a state actor, there are no constitutional dimensions to his choice of beneficiaries. Equal protection does not require that all children be treated equally; . . . and the free exercise clause does not require a grandparent to treat grandchildren who reject his religious beliefs and customs in the same manner as he treats those who conform to his traditions." (*Id.* at 36-37). The Court rejected Petitioner's interpretation of *Shelley v. Kraemer*, 334 U.S. 1 (1948), holding that "[t]his court . . . has been reluctant to base a finding of state action on the mere fact that a state court is the forum for the dispute." (App. 37) (internal quotations and citations omitted). *See also*, note 4 and accompanying text, *infra*.

ARGUMENT

A. There Is No Compelling Reason to Hear Petitioner's Equal Protection Arguments.

Petitioner fails to demonstrate a "compelling reason" this Court should grant review on a writ of certiorari with respect to Petitioner's Fourteenth Amendment arguments. SUP. CT. R. 10. Petitioner fails to establish either (1) a conflict between the Illinois Supreme Court's decision and the decision of any other state court of last resort or federal court of appeals or (2) that the Illinois Supreme Court decided an important question of federal law in the absence of or in conflict with a decision of this Court. SUP. CT. R. 10(b) & (c). The petition should be denied.

Petitioner's underlying argument is easily summarized. Petitioner does not deny that "Max and Erla could have accomplished the goal of benefitting only those grandchildren who married within their religious tradition by individually naming those grandchildren as beneficiaries of the will or the trust. . . ." (App. 6). Petitioner contends, however, that a violation of the Fourteenth Amendment occurred when Max used a religious description to define a class or category of descendants he wished to benefit, rather than mention them by name, and a state court gave legal effect to the document containing that description. (Pet., p. 11). Petitioner seeks to expand this Court's holding in *Shelley v. Kraemer*, 334 U.S. 1 (1948), beyond the context of racially-discriminatory restrictions on property rights to forbid state courts

from giving legal effect to any private document making a distinction on the basis of religion (or, presumably, any suspect class).

1. Petitioner cannot establish a conflict among the relevant courts.

Petitioner fails to establish that her proposed expansion of *Shelley* should be heard by this Court. Firstly, Petitioner makes no effort whatsoever to show that the Illinois Supreme Court's decision either conflicts with the decision of another state court of last resort or of a United States court of appeal or decided an important question of federal law that has not been, but should be, settled by this Court. SUP. CT. R. 10(b)

Petitioner cannot, in fact, make such a showing. The highest courts of Massachusetts, Pennsylvania and Oregon – to Respondent's knowledge, the only relevant courts to consider the question – all held that *Shelley* has no application in the judicial enforcement of a testamentary condition encouraging adherence to or marriage within a particular faith. *See Gordon v. Gordon*, 124 N.E.2d 228, 235 (Mass. 1955) (revoking inheritance upon marriage outside the Jewish faith); *United States Bank of Portland v. Snodgrass*, 275 P.2d 860, 866 (Or. 1954) (revoking inheritance upon marriage within Catholic faith prior to thirty-second birthday); *In re Estate of Laning*, 339 A.2d 520, 525 (Pa. 1975) (conditioning inheritance on membership in Presbyterian Church).

Similarly, in the few instances in which this Court addressed wills or trusts granting property for purposes implicating suspect classifications, namely, the establishment and operation of racially-discriminatory educational or municipal institutions, this Court declined to apply, or even mention, *Shelley* or to rule that court enforcement of the will or trust terms themselves would be unconstitutional and, instead, focused on the fact that state involvement in the resulting institutions would constitute discriminatory state action. *See Pennsylvania v. Board of Dirs. of City Trusts of Philadelphia*, 353 U.S. 230, 230-31 (1957) (will leaving property in trust for establishment of college admitting whites only); *Evans v. Newton*, 382 U.S. 296, 298-302 (1966) (will leaving property in trust for establishment of municipal park admitting whites only). *But cf. Pennsylvania v. Brown*, 392 F.2d 120, 124 (3d Cir. 1968) (stating, in successor to *City Trusts*, that *Shelley* "points to affirmance" of judgment forbidding state college from excluding non-whites) (*dicta*).

Furthermore, this Court's ruling in *Evans v. Abney*, 396 U.S. 435 (1970), the successor to *Newton*, strongly implies that *Shelley* has no application in the judicial interpretation or execution of private wills and trusts. The *Abney* court ruled that, since the relevant municipality could not operate a whites-only park in accordance with the testator's trust, the trust's purpose had failed, the common law reversionary rule would apply and the park property would revert to the testator's estate. *Abney*, 396 U.S. at 444.

The *Abney* court might have been expected to forbid enforcement of the "whites-only" provisions of the trust, much as the *Shelley* court forbid enforcement of the racially-restrictive covenants at issue there. The fact that *Abney* relied on the facially-neutral, common law reversionary rule, instead – in effect, giving force to the testators' discriminatory intent that the park be used by whites only or not at all – strongly suggests that this Court did not intend *Shelley* to mean that judicial involvement in the interpretation and execution of a private will and trust renders that involvement or those private documents discriminatory state action under the Fourteenth Amendment.

Because Petitioner cannot demonstrate a conflict between the decision of the Illinois Supreme Court and that of this Court, any state court of last resort or any federal court of appeals, the petition should be denied.

2. Petitioner cannot demonstrate a conflict between the Illinois Supreme Court's decision and this Court's decision in *Shelley*.

Petitioner's underlying argument is, in any case, meritless. The Illinois Supreme Court did not deprive Petitioner of an existing right, as the state courts did in *Shelley*, and the Illinois courts' declaration of the validity of a private document is not such pervasive action as to make that private document's content the

equivalent of discriminatory state action.[3] The petition should be denied.

Shelley addressed a restrictive covenant recorded against certain residential real estate in St. Louis, Missouri. 334 U.S. at 4-5. That covenant restricted the property's use and occupancy to members of "the Caucasian race" for a period of fifty years. *Id.* The owner of the property, however, sold it to the Shelleys, who were African-American. *Id.* at 5. Third party owners of neighboring properties subject to the covenant sued in Missouri's state courts, seeking an injunction preventing the Shelleys from taking possession of their property and an order divesting their title and revesting title in the prior owner. *Id.* at 6.

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[3] Respondent does not concede that the underlying private conduct would violate the Fourteenth Amendment, even if this Court found an injury and state action. Given the nature of a petition for writ of certiorari, however, and the fact that Petitioner simply assumed, without establishing, an underlying violation, Respondent does not address this point in full. Instead, Respondent reserves his right to fully argue this point in the event the petition is granted and notes that persons who marry outside their religion are not a suspect class and, therefore, the classification at issue would receive "rational basis" review. *United States v. Carolene Prods Co.*, 304 U.S 144, 152 n 4 (1938). The Illinois Supreme Court recognized that Max Feinberg's intent was to "promot[e] through his own family the preservation of the Jewish culture and faith that he both treasured and feared was at risk." (App. 16, 65). This, and the common law preference in favor of giving effect to a testator's intent are, surely, legitimate interests to which the enforcement of Max and Erla's testamentary documents is rationally related. *See In re Estate of Hughlett*, 113 Ill App. 3d 910, 913 (1983) (Illinois policy favoring enforcement of testator's intent).

Although the trial court denied the third parties' claims, the Supreme Court of Missouri reversed and directed the trial court to grant the third parties' requested relief. *Id.* The Shelleys were occupying the property at the time of the Missouri Supreme Court's decision. *Id.*

This Court reversed, holding that, although the Fourteenth Amendment "erects no shield against merely private conduct," the judicial enforcement of the restrictive covenants constituted state action violating the Equal Protection Clause:

> The undisputed facts disclose the petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts for sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without constraint.
>
> These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the

> grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

Id. at 19.

As the foregoing excerpt makes clear, the Court's ruling hinged on two key points. First, the state courts' actions deprived the Shelleys of equal protection, not merely because they enforced a private document containing a race-based distinction, but because this enforcement effectively abridged basic property rights otherwise available to all citizens, namely, the right to purchase and occupy property pursuant to legal and voluntary contracts of sale. As Chief Justice Vinson, the author of this Court's opinion in *Shelley*, later observed in his dissenting opinion in *Barrows v. Jackson*, 346 U.S. 249, 261 (1953):

> [t]he question which we decided was simply whether a state court could decree the ouster of Negroes from property which they had purchased and which they were enjoying. We held that it could not. We held that such judicial action, which operated directly against the Negro petitioners and deprived them of their right to enjoy their property solely because of their race, was state action and constituted a denial of "equal protection."

Second, the state courts' rulings constituted state action under the Fourteenth Amendment not merely because those courts served as forums for a dispute, but because they effectively transformed the coercive power of the state into an invasive tool to enforce discrimination, even between individual, private and willing sellers and buyers who had no personal wish to discriminate. The restrictive covenants, though created through private conduct, were given the effect of state action when state courts came between private actors to frustrate otherwise-lawful commercial transactions on discriminatory grounds.

a. Petitioner was not deprived of a right.

The Illinois Supreme Court's decision has neither of the two key elements present in *Shelley*. First, and perhaps most importantly, the decision in no way operated to deprive Petitioner – or any class of which Petitioner is a member – of a property right generally enjoyed by others. Indeed, it could not because, as the Illinois Supreme Court made abundantly clear, Petitioner never had a vested right in any inheritance whatsoever. Under Illinois law, Petitioner was not an heir at law of Max or Erla and, therefore, had no expectancy of an inheritance. (App. 38). Moreover, neither Max's trust or Erla's appointment created a vested right under Illinois law:

> Max's will and trust created no vested interest in the children or grandchildren because Erla retained a power of appointment until her death. No vested interests were created

> in 1997 by Erla's exercise of her power of appointment. Her actions created a mere expectancy, contingent on her dying without further amending the distribution scheme.

(*Id.* at 32). Unlike the Shelleys, no right was taken from Petitioner because Petitioner had no right to take.

More generally, the Illinois Supreme Court's decision does not effectively deprive or attempt to deprive gentiles or Jewish people who marry gentiles of the right to inherit because it does not enforce a larger, discriminatory pattern designed to deprive those groups of inheritance rights. The specific restrictive covenant considered in *Shelley* operated as part of a larger plan to deprive non-whites of basic property rights and were created against a backdrop of widespread public and private efforts to perpetuate centuries-old, but unlawful, race-based discrimination. There is simply no comparison to the case at bar. There is no history of gentiles and Jewish persons who marry gentiles being denied the equal protection of the nation's probate laws; there is no co-ordinated effort by elderly Jewish grandparents to deprive all gentiles or Jewish persons marrying gentiles of their rights under the Illinois Probate Act and related common law. Even if the Illinois Supreme Court had denied Petitioner a right to inherit – which it did not, as set forth above – that denial would go no further than Petitioner; it certainly would not put the state's seal of approval on a widely-known effort by private individuals to enshrine religious discrimination in

private trust and estate documents generally – as opposed to the state courts' opinions in *Shelley*, which effectively approved a co-ordinated private effort to inject racial discrimination into otherwise voluntary and lawful private real estate sales. No gentile, or Jewish person marrying a gentile, need fear that the probate court will come between that person and a willing testator to enforce a third party's discriminatory views.

b. The Illinois Supreme Court did not invade a transaction between willing parties to enforce a third party's discriminatory scheme.

While the Illinois Supreme Court's decision may have constituted "state action" in and of itself, that decision was not so invasive or dominating in character that it cloaked Max Feinberg's private conduct with the authority of the state, thereby rendering that private conduct "state action" for the purposes of Fourteenth Amendment jurisprudence.

The "state action" requirement is a prudential doctrine, intended to create a sphere of private conduct the state cannot enter, not to expand the scope of the Fourteenth Amendment's protections into the realm of private conduct.

> [C]onstitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities. This fundamental limitation on the scope of constitutional

> guarantees preserves an area of individual freedom by limiting the reach of federal law and avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991).

In order for private conduct to be attributed to the state, the state's involvement must be more than merely incidental. Instead, governmental authority must "dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional guarantees." *Id.* at 620.

Thus, it is uncontroversial to say that "[t]he action of state courts and judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment. . . ." *Shelley,* 334 U.S. at 14. A judicial officer's discriminatory exercise of his or her office is, for instance, plainly forbidden. *See Palmore v. Sidoti*, 466 U.S. 429, 430-34 (1984) (state court awarded child custody to father because mother's new husband African-American).

There is no authority, however, for the proposition advanced by Petitioner, namely, that a state

court raises private conduct to the level of state action merely by enforcing a private document containing a restriction that would unconstitutionally abridge a federal right if, for instance, passed by a legislature.[4] (Pet., pp. 8-11). That is certainly not the holding of *Shelley*. There, the court enforcement of a private document would have, essentially, placed the power of the state at the disposal of a co-ordinated scheme to deprive non-white citizens of their legal rights – to force them into a second-class scheme of property rights, in fact – and would have done so in a particularly invasive and dominating way, namely, by coming between willing buyers and sellers to enforce third party discrimination. *Shelley*, 334 U.S. at 19. In

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[4] At least, this appears to be Petitioner's argument; the petition itself is far from clear In briefing before the Illinois Supreme Court, Petitioner's entire Fourteenth Amendment argument consisted of three sentences, reproduced verbatim here.

> While it was perfectly permissible for Max Feinberg, as an individual during his life, to perpetuate the Jewish faith, the Court, an instrumentality of the State, cannot do the same by enforcing the Jewish Clause without running afoul of the Federal and State Constitutions *See Shelley v Kraemer*, 334 U.S 1, 68 S Ct. 836, 843 (1948) (ruling that "state action in violation of the [Constitution's] provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official . . .") Thus, the court, acting on behalf of the State, may not use its coercive power to perpetuate the Jewish faith where, as here, the State could not enact a statute for the purpose of perpetuating the Jewish faith.

(Pet'r's Ill Sup Ct. Br., p. 36).

the words of the *Edmonson* court, the Shelleys' injuries were "aggravated in a unique way by the incidents of governmental authority" and those injuries would have been replicated again and again in reliance on the acquiescence and co-operation of state courts. *Edmonson*, 500 U.S. at 622.

Both this Court and multiple federal courts of appeal have rejected – whether implicitly or explicitly – Petitioner's interpretation of *Shelley* and have declined to find state action in the mere judicial enforcement of private documents. For instance, in addition to the trusts and estates cases addressed in Part A.1, *supra*, at least one state court of last resort has held that, despite *Shelley*, its enforcement of a private pension contract allegedly classifying parties on the basis of marital status did not constitute discriminatory state action. *Meisner v. Potlatch Corp.*, 954 P.2d 676, 680-81 (Idaho 1998) ("Under [Plaintiff's] theory, any party to a private contract could invoke the Fourteenth Amendment simply by filing an action in state court. We decline to give Shelley the broad reading [Plaintiff] urges upon us."). Similarly, courts have consistently held that, despite *Shelley*, they may enforce private contracts abridging other constitutional rights, such as First Amendment speech rights, even though legislation imposing identical restrictions would be unconstitutional. *See United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940, 943 (11th Cir. 1995) (settlement agreement restricting advertising content); *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 29 P.3d 797, 810-11 (Cal.

2001) (restrictive covenant prohibiting tenants from distributing leaflets); *Linn Valley Lakes Prop. Owners Ass'n v. Brockway*, 824 P.2d 948, 951 (Kan. 1992) (restrictive covenant prohibiting landowners from posting signs). The same is true of enforcement of contracts for private arbitration, even where the arbitration procedures at issue would not satisfy the requirements of the Due Process Clause. *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191-92 (11th Cir. 1995). Nor have courts found unconstitutional state action in the enforcement of a collective bargaining agreement that allegedly limited workers' First Amendment association rights. *White v. Communications Workers, Local 1300*, 370 F.3d 346, 352 (3d Cir. 2004) ("If the fact that the government enforces privately negotiated contracts rendered any act taken pursuant to a contract state action, the state action doctrine would have little meaning."). Respondents are unaware of any court that has adopted Petitioner's reading of *Shelley*.

The policy basis for rejecting Petitioner's reading of *Shelley* is clear enough. If private activity – even private discrimination – were deemed "state action" merely because a state court denied relief to a party challenging that private activity, parties could, essentially, "manufacture" state action by bringing suit in a state court. Indeed, there would be no distinction between state and private action, and no protected sphere of private conduct, since a challenger to that conduct would always prevail – either the state court would grant relief to the challenger or it would deny

relief, thereby engaging in "unconstitutional" state action.

Given the invasive character of the state action in *Shelley* and the vitality of the state action doctrine as articulated in *Edmonson*, the lack of precedential support for Petitioner's reading of *Shelley* is not surprising. Indeed, Petitioner's entire argument depends on a certain, willful ignorance of post-*Shelley* state action jurisprudence. Petitioner cites various scholarly articles, for example, for the overly general proposition that *Shelley* "has proven to be controversial," presumably to create the impression that Petitioner's reading of *Shelley* is actively debated and, in some cases, supported, in the federal courts of appeal and state courts of last resort but, in fact, there is no such debate. As the above-cited authorities demonstrate, Petitioner's reading of *Shelley* has long been rejected. (Pet., pp. 7-8).

Petitioner entirely misplaces her reliance on *Reitman v. Mulkey*, 387 U.S. 369 (1967). Petitioner claims that the case at bar is "the precise kind of situation" presented in *Reitman* because the Illinois Supreme Court "authorized" private discrimination. (Pet., p. 11). There is, in fact, a vast difference between the state action in these two cases. In *Reitman*, the State of California passed a constitutional amendment that would have forbidden any legislative limit on a person's right to refuse to sell or rent their property in their absolute discretion. 387 U.S. at 370. After examining California's actions "in terms of its immediate objective, its ultimate effect and its historical context

and the conditions existing prior to its enactment," this Court held that the State had encouraged and placed its authority at the disposal of a widespread, private effort to discriminate against non-whites by creating an affirmative constitutional right to engage in such discrimination. *Id.* at 373-79 (internal quotations omitted).

California's enaction of a state constitutional amendment for the express purpose of aiding historical, private discrimination cannot reasonably be compared to a single court decision denying a single person an inheritance to which she never had a right in the first place, absent a context of widespread historical discrimination against gentiles and an invidious intent on the part of the state court. Indeed, the Illinois Supreme Court did not even come between willing parties, as in *Shelley*; neither Max nor Erla ever intended for Michele to receive an inheritance, as demonstrated by their use of the Religious Preference Clause.

Petitioner's efforts to ignore the invasive character of the state action in *Shelley* and to "cherry-pick" a single word – "authorize" – from *Reitman* while ignoring all of the other facts and circumstances of those cases should not be countenanced. Because Petitioner cannot show that the Illinois Supreme Court acted in a manner so invasive or dominant that it cloaked private conduct in the authority of the state, Petitioner's argument is meritless and the petition should be denied.

c. The trust and appointment at issue did not require court enforcement.

At times, Petitioner seems to limit her theory of judicial "state action" to judicial interpretation of a private document that, by its nature, "requires" court enforcement or involvement in order to achieve the drafter's underlying purpose. (Pet., pp. 5, 10-11). While this would certainly constitute a stronger version of the state action doctrine than the one originally proposed by Petitioner, it suffers from a complete lack of legal and factual basis.

Firstly, there is simply no legal precedent for Petitioner's argument – much less precedent rejecting it – and, therefore, it is not ready for review by this Court. SUP. CT. R. 10(b). Second, court involvement was not, in fact, required to give effect to Max's trust or Erla's appointment. Max's trust was administered by the trustee without any court supervision whatsoever from the time of Max's death in 1986 until Erla's death in 2003 and the probate of her estate in 2004. (C0085). Petitioner cites no provision of the Illinois Probate Act or the common law requiring a trustee of an irrevocable trust to seek court approval of the trust's administration or, even, to notify a court of the trust's terms and Respondent is aware of no such applicable provision. Nor do Petitioners deny that the trustee was authorized to administer Erla's appointment without court supervision or notification. To Respondent's knowledge, neither the Illinois Probate Act nor the common law required court enforcement or interpretation of Max's trust or Erla's

appointment, as Petitioner, without citation to authority, claims. (Pet., pp. 5, 10-11). Because Petitioner cannot articulate a valid theory of state action applying to this case, the petition should be denied.

d. The "balancing view" is irrelevant.

Petitioner makes an argument under what she calls the "balancing view" of Fourteenth Amendment jurisprudence, in which the formal requirement of state action is jettisoned in favor of a view that balances the injury to the aggrieved party against the merits of the challenged practice. (Pet., pp. 12-14). This argument is entirely irrelevant, as there is no legal precedent for abandoning the state action doctrine; certainly, Petitioner cites none. Given the holding in *Edmonson*, it would appear that the state action doctrine is alive and well. The petition should be denied.

B. There Is No Compelling Reason to Hear Petitioner's Establishment Clause Argument.

1. Petitioner cannot establish a conflict among the relevant courts.

Again, Petitioner cannot demonstrate a conflict between the decision of the Illinois Supreme Court and a decision of another state court of last resort or any federal court of appeals with respect to her Establishment Clause argument. The highest courts of both Pennsylvania and Oregon – to Respondent's

knowledge, the only courts to consider the question – have rejected the argument that declaring the validity of a testamentary religious preference or religious adherence clause constitutes a state action "respecting an establishment of religion" in violation of the First Amendment to the United States Constitution. *See Laning*, 339 A.2d at 525-26 ("we think it clear that the provisions of Pennsylvania law providing for the judicial enforcement of testamentary conditions, whether religious or otherwise, do not constitute a 'law respecting an establishment of religion'"); *Snodgrass*, 275 P.2d at 866 (Establishment Clause "has no effect upon the transactions of individual citizens"). Because Petitioner cannot demonstrate the existence of such a conflict, the petition should be denied.

2. Petitioner cannot demonstrate a conflict between the Illinois Supreme Court's decision and a decision of this Court.

Petitioner's Establishment Clause argument has, in fact, no legal basis whatsoever. Leaving aside the state action problems addressed above, neutral court recognition of a testamentary condition's validity does not violate the Establishment Clause where the conditions have only an incidental effect on the advancement or inhibition of religion. Petitioner contends that court enforcement of the Religious Preference Clause would impermissibly advance religion,

citing *Lynch v. Donnelly*, 465 U.S. 668 (1984). (Pet., pp. 14-15).

A state court's neutral declaration of a private legal document's validity falls far short of the level of state involvement required to implicate the Establishment Clause.

> [S]ubsequent decisions [to *Lynch*] . . . have refined the definition of governmental action that unconstitutionally advances religion. . . . [W]e have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion. . . . [T]he prohibition against governmental endorsement of religion precludes government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*.

County of Allegheny v. ACLU, 492 U.S. 573, 592-93 (1989) (citations omitted) (emphasis in original). "[I]t is no violation for government to enact neutral policies that happen to benefit religion." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995) (citations omitted) (state policy of permitting privately-provided displays in state-owned public square irrespective of content). The test Petitioner proposes, "which would attribute to a neutrally behaving government *private* religious expression, has no antecedent in our jurisprudence. . . ." *Id.* (emphasis in original).

Petitioner cannot plausibly argue that court enforcement of the Religious Preference Clause in

accordance with the neutral policy of giving effect to testators' intent would convey the message that Judaism is now the State of Illinois' favored or preferred religion. *See Hughlett*, 113 Ill. App. 3d at 913 (Illinois policy favoring enforcement of testators' intent). Nor can she plausibly claim that neutral enforcement of wills and trusts based on long-standing common law principles does anything other than provide an incidental benefit to private religious expression. *Cf. Doe SD v. Salvation Army*, No. 07-CV-362, 2007 U.S. Dist. LEXIS 69728, at *21-22, 34 (E.D. Mo. Sept. 20, 2007) (enforcing neutral common law of torts against religious organization does not violate Establishment Clause).

3. The Religious Preference Clause presents a question of fact, not of religious doctrine.

Petitioner cites no authority for or against her bald assertion that a court would "necessarily run afoul of the Establishment Clause" if it attempted to answer the factual question of whether Respondent's husband was, in fact, of "the Jewish faith." Accordingly, because Petitioner cannot demonstrate a conflict between the decision of the Illinois Supreme Court and a decision of this Court, a state court of last resort or a federal court of appeals, the petition should be denied. SUP. CT. R. 10(b) & (c).

Nor is the issue relevant or justiciable in this case. Judaism may have many branches, but Petitioner's husband does not belong to any of them. (Pet.,

p. 3; App. 4-5). Even if there were some question, it would be, unremarkably, resolved as would any other question of intent and fact: by determining what the testator meant by the words "Jewish faith" and then determining whether the grandchild's spouse satisfied that definition. *See Larison v. Record*, 117 Ill. 2d 444, 448 (1987) ("Extrinsic evidence of a testator's intent is admissible . . . to resolve an ambiguity in a will."). Massachusetts' highest court, addressing a provision revoking gifts to beneficiaries who married persons not born in the "Jewish faith," approved precisely this course of action, holding that the "language of the testator is not too uncertain to be enforced" and that "the question of fact as to the religious faith of [the beneficiary] should [not] be determined in vacuo any more than should any other question of fact." *Gordon*, 124 N.E.2d at 232. There is no reason to believe that a factual determination of Max's understanding of the "Jewish faith" and a hypothetical grandchild's hypothetical spouse's satisfaction of that definition would be any more difficult in this case than the comparable determinations in *Gordon*. The petition should be denied.

C. There Is No Compelling Reason to Hear Petitioner's "Right to Marry" Argument.

Petitioner cites no authority for or against her claim that the Illinois Supreme Court's decision violated her fundamental right to marry. Accordingly, because Petitioner cannot demonstrate a conflict between the decision of the Illinois Supreme Court and a decision of this Court, a state court of last resort or

a federal court of appeals, the petition should be denied. SUP. CT. R. 10(b) & (c).

Petitioner's claim is, in any event, meritless. In addition to the insurmountable state action problems addressed above, Petitioner forgets that the Clause operated as a condition precedent and that both Max and Erla Feinberg had every right to attempt to influence their grandchildren's behavior during their lifetimes, even through the offering of financial incentives. (App. 16). Petitioner's claim also presupposes that the Religious Preference Clause exerts a persuasive force so powerful that it amounts to duress – in effect, forcing the grandchildren not to marry the spouses of their choice. We know this supposition to be false, however: four out of the five grandchildren did, in fact, marry outside of the Jewish faith, despite the Clause. (App. 4-5). The claim further assumes that a state court's enforcement of the Religious Preference Clause is the functional equivalent of the state's use of force to require or forbid a particular marriage. Again, this assumption is false: if the Clause were enforced (and were the grandchildren not already married), the grandchildren would be free to marry whomever they choose, provided they were willing, as a matter of conscience, to forego their inheritance. Indeed, even that sacrifice would not be necessary were a non-Jewish spouse to convert to Judaism in a timely manner. (Pet., p. 3). There simply is no violation of Petitioner's right to marry and no reason to hear further argument. The petition should be denied.

D. Courts Need Not Enforce "Bigotry."

Petitioner does not even attempt a constitutional or other legal argument in her final, naked effort to inflame this Court's passions. (Pet., pp. 17-19). Instead, she calls her grandparents "bigots" and claims that if they are not stopped, law and reason be damned, future state courts will have "no choice but to enforce all sorts of the worst bigotry imaginable." (*Id.* at 19) (citations and internal quotations omitted).

Petitioner's argument is nothing more than a gross attempt to mislead this Court. There is nothing whatsoever in the record suggesting that Max Feinberg was motivated by religious prejudice, bigotry, or anything other than a sincere intention "to encourage and support Judaism and preservation of Jewish culture in his own family" and, as a contemporary of the Holocaust, his fear of "the potential extinction of the Jewish people." (App. 16, 65; C1879-80). For Petitioner to suggest otherwise is an offense to this process.

Petitioner's attempt to find "bigotry" in the fact that the Religious Preference Clause does not disinherit unmarried grandchildren overlooks the larger purpose of the clause. (Pet., pp. 18-19). The Clause's principal purpose is not to reward particular marriages *per se*, but to "provide a benefit for those descendants of [Max's] children who opt to honor and further [Max's] commitment to the Jewish faith. . . ." (App. 16, 65; C1879-80). One way to further Max's commitment to the Jewish faith was to marry within

that faith since "Jewish religious law prohibits intermarriage and treats it as an abandonment of the faith. . . ." Bleich, *supra*, at 268. Remaining unmarried is another such way, since a grandchild who remains unmarried does not abandon the faith under Jewish law. Marriage outside the Jewish faith, however, unquestionably does result in the abandonment of the faith under traditional Jewish law. *Id.* Thus, the Clause was not intended to "punish" marriage outside the faith, but to benefit those who remain within the faith, either by marriage within the faith or by remaining unmarried.

Finally, it does not logically follow that enforcing, today, a provision intended to preserve and to foster a minority religious tradition will "require" courts to enforce, tomorrow, provisions intended to perpetuate bigoted and discriminatory attitudes towards that same minority. Public policy and constitutional determinations require a more flexible inquiry than this false, "logical" equivalency and future courts, if they so desire, will have no difficulty identifying a plethora of constitutional, statutory and judicial authorities – from hate crime laws to equal employment protections – supporting establishment of a public policy against testamentary conditions motivated by prejudice and hatred.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

MICHELE FEINBERG TRULL,

Petitioner,

vs.

MICHAEL B. FEINBERG,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Supreme Court

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Max Feinberg so opposed the very idea of his grandchildren marrying any person who is not a Jew, that he offered a cash reward, to be held over his grandchildren's heads long after Max died, and to be paid only to those grandchildren who married within the Jewish faith or if they did not marry at all. In other words, Max Feinberg preferred that his granddaughter Michele (who was only fifteen years old when Max Feinberg wrote this clause and seventeen when he died) live and die a spinster than marry a non-Jew, thereby largely also excluding, for example, African Americans, Hispanics and Asians as potential marriage partners. Respondent Michael Feinberg somehow fails to recognize the clear religious and racial bigotry embedded in this testamentary scheme. Following the Illinois Supreme Court decision, bigotry of this sort now must be enforced by the Illinois courts.

Ignoring the plain language of Max's Trust documents and its inescapable purpose, Respondent claims that there is no basis to ascribe a bigoted motive to Max Feinberg. Instead, Respondent tries to attribute noble motives, saying that Max simply wanted to promote and preserve the Jewish culture and faith that he both treasured and feared was at risk. Resp., p. 1. Of course, this is precisely the same justification routinely spewed to justify the worst

discrimination imaginable, including discrimination against Jews.

ARGUMENT

A. The Illinois Supreme Court's Decision To Repudiate *Shelley v. Kraemer* Is A Compelling Reason To Grant Petitioner's Writ

Michele Trull's Petition establishes a "compelling reason" to grant review pursuant to Supreme Court Rule 10(c), because the Illinois Supreme Court's decision is directly contrary to this Court's landmark holding in *Shelley v. Kraemer*, 334 U.S. 1 (1948). Respondent substantially mischaracterizes Michele's argument as seeking to expand this Court's holding to prevent state courts from giving legal effect to any private document that makes a distinction based upon religion or some other suspect class. Resp., pp. 7-8. To the contrary, Michele is narrowly asking the Court to grant certiorari to provide guidance to lower courts regarding how to interpret *Shelley* in connection with the interpretation and enforcement by the state of discriminatory testamentary instruments based upon religious or racial classifications.

i. Enforcement of Max Feinberg's Religious Preference Clause Requires State Action

Respondent glosses over the critical reason why *Shelley* is applicable here. According to Respondent,

"The use of such conditions is the legal and functional equivalent of simply excluding certain potential beneficiaries by name which, all parties concede, is legally permissible regardless of the testator's underlying reasons or motivations." Resp., pp. 5-6. But of course, the use of religious or racial classifications is nothing like excluding beneficiaries by name. The former requires state action while the latter does not.

Hypothetically, Max Feinberg could have written into his will "to Michele I leave nothing because she married a gentile." The state court could enforce that testamentary disposition because it would not have to base its decision on any criteria prohibited by the Constitution.

In this case, however, the Religious Preference Clause says that Michele shall be deemed deceased if she "marries outside the Jewish faith." (App 63). This is very different from the example above, because it requires the state court to decide the case by looking at the religion of Michele's husband; if he is Jewish, Michele wins and if he is not Jewish, Michele loses.[1]

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[1] Respondent wrongly states that Petitioner Michele Trull concedes she did not marry within the Jewish faith. Resp., p. 3. To the contrary, Michele argued in every court below that the clause "marries within the Jewish faith" was too indefinite to be enforced as it could simply mean that Michele was required to marry Ethan in a Jewish ceremony – which she did – and because of the indeterminable nature of the question "who is a Jew?", upon which even Jews apparently cannot agree. (App 64). Michele only concedes here that her husband Ethan Trull is

(Continued on following page)

"The explicit use of a racial classification by the probate court would fail under strict scrutiny, just as it did in *Shelley*." Barbara Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 Cornell L. Rev. 1053, 1090-91 & n. 202 (1990).

Because the Religious Preference Clause does not exclude beneficiaries by name, but instead seeks to exclude beneficiaries based upon religious classification, it cannot be given effect simply by neutral enforcement by a state court. Instead, it requires the state court to itself engage in discrimination based upon religion. In this case, to enforce the Clause, the state court would have to: 1) determine what Max Feinberg meant by "marries outside the Jewish faith"; 2) assuming that language means (as the Illinois Supreme Court assumed without inquiry) "must marry a Jew," then determine what constitutes being a "Jew"; 3) determine whether Ethan Trull is, in fact, a Jew; and 4) if Ethan is determined not to be a Jew, deem Michele to be deceased. Even if Michele were to concede that Ethan is not Jewish, that would simply be a basis upon which the state court could make its determination; it would not relieve the court of its obligation to determine and rule whether Ethan is a Jew. Such active participation in overt discrimination by the state is prohibited by the Equal Protection

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not Jewish. The state court has not yet determined whether the spouses of any of the grandchildren are Jewish.

Clause, as interpreted by the Court in *Shelley v. Kraemer*.

ii. Michele Had a Vested Right Under Erla's Power of Appointment

Michele's rights vested when Erla Feinberg died. The Illinois Supreme Court pointed out that Erla's exercise of her Power of Appointment created a mere expectancy, contingent upon her dying without further amending the distribution scheme. (App 32). Of course, as a matter of undisputed fact, Erla did die without further amending the distribution scheme. From that moment, Michele had a vested right subject only to the condition precedent that she might be "deemed deceased" for having "married outside the Jewish faith." Respondent's argument that Michele did not have a vested right is circular because it depends upon the assumption that Michele was properly "deemed deceased" by the state.

Respondent mischaracterizes the state of affairs upon Erla's death. According to Respondent: "Erla's appointment, therefore, created a condition precedent on the grandchildrens' [sic] inheritances; the only relevant factual determination regarding the Clause's application was the grandchildren's marital status at the time of Erla's death." Resp., p. 5. This statement is incorrect. To determine the application of the Religious Preference Clause, the state court first had to determine the grandchildren's marital status (married or unmarried) *and* if married, then determine

whether the grandchild married outside the Jewish faith. The first part of the question can be neutrally determined. The second cannot.

The only way that Michele loses her vested interest in Max Feinberg's estate granted by Erla's Power of Appointment is by application of the condition precedent. Because the condition precedent – marriage within the Jewish faith – cannot be neutrally determined but instead requires state action, Michele cannot be divested of her interest without state action in violation of the Equal Protection Clause.

iii. The Trust and Appointment at Issue Cannot be Enforced Without State Action

Respondent states that nothing in Max's Trust or Erla's appointment required court involvement or approval. Resp., p. 3. This argument is obviously wrong and patently frivolous, considering the lengthy record below. The Religious Preference Clause here, just like the restrictive covenant at issue in *Shelley*, is self enforcing only until challenged by an affected party. Then, like any other disputed private covenant or agreement, it is only effective if enforced by a court.

iv. Michele Agrees that the Unitary View of State Action Should Apply

Respondent criticizes Michele for arguing in her Petition that even an applying the "balancing view" of state action advocated by Professor Laurence Tribe,

any application of a balancing test weighs heavily in favor of Michele. Resp., p. 24. Laurence Tribe, American Constitutional Law § 18-1, at 1688 (2d ed. 1988). Michele agrees with Respondent that the unitary view of state action is applicable, but included this argument in her Petition for Writ of Certiorari because the Illinois Supreme Court relied exclusively upon Tribe as the basis for its decision to disregard *Shelley*. If Respondent now agrees, as he says, that "there is no legal precedent for abandoning the state action doctrine," then Respondent apparently agrees that the Illinois Supreme Court made a mistake in repudiating *Shelley* and Michele's Petition should be granted.

B. The Illinois Supreme Court Failed To Address Michele's Establishment Clause Argument

Respondent argues that Michele "cannot demonstrate a conflict between the decision of the Illinois Supreme Court and a decision of another state court of last resort or any federal court of appeals with respect to her Establishment Clause argument." Resp., p. 24. Frankly, this is because the Illinois Supreme Court did not make any decision regarding the Establishment Clause.

The record is clear that the Illinois Supreme Court completely disregarded Michele's Establishment Clause argument in its holding. The Court should have determined whether enforcement of the

Religious Preference Clause would tend to establish a religious preference or religious faith (Respondent himself says that is its purpose) – but the Court skipped over that question.

Respondent emphasizes that neutral enforcement of a testator's intent to promote and preserve Jewish culture and faith (Resp., p. 1) cannot constitute violation of the Establishment Clause. Again, this argument is circular, because it assumes that the state court's enforcement of the Religious Preference Clause can be done neutrally and without state involvement. That is the central issue presented by this Petition for Writ of Certiorari. If, as Michele argues, enforcement of the clause requires state action, then that state action would tend to establish a religion or religious faith and the Establishment Clause is implicated.

C. If The Illinois Supreme Court's Decision Is Allowed To Stand, Then State Courts Will Be Required To Enforce "The Worst Bigotry Imaginable"

Respondent passionately objects to what he calls Michele's claim that enforcement of the Religious Preference Clause will lead to state courts being required to enforce the "worst bigotry imaginable." Resp., p. 30. Respondent omits "citations and internal quotations" (*Id.*), precisely because this quote originates not from Michele, but from Illinois Appellate Justice Quinn. (App 51). Of course, Justice Quinn was right. There is no difference between the Religious

Preference Clause at issue here and a testamentary clause designed to prevent marriages to "someone who is Jewish or black or a member of any other group that Max did not like." (Justice Quinn, App 51). The fact that this quote, from an Illinois Appellate Judge, inflames such passion from Respondent is a direct reflection of the underlying ugliness of the Clause itself. Perpetuating such bigotry should not be the business of the State of Illinois or any other state.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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